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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~362.~~ 98

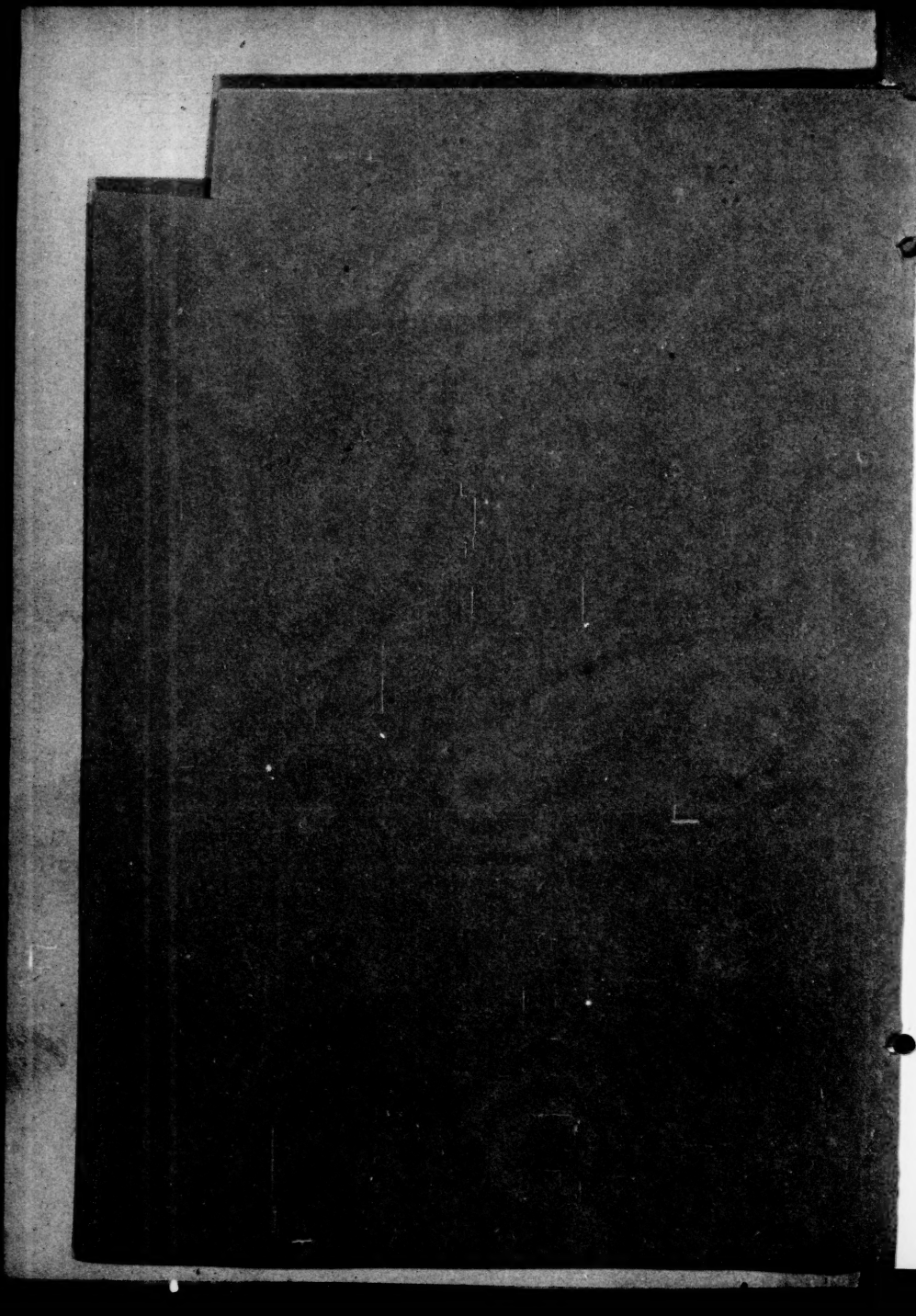
THE UNITED STATES EX REL. ALFRED HUIDEKOPER, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED MARCH 3, 1876.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1875, thereof, between the United States on the relation of Alfred Huidekoper against the county court of Macon County, Missouri, a manifest error hath happened, to the great damage of the said Alfred Huidekoper, relator, as aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri.

Allowed by—

JOHN F. DILLON, *Judge.*

2 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the within writ of error, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

Witness my hand at office in the city of Jefferson this 28th day of December, A. D. 1875.

H. C. GEISBERG, *Clerk.*

(Indorsed:) No. 463. United States circuit court, western district of Missouri. United States ex rel. A. Huidekoper, P. E., vs. County Court of Macon Co., Missouri, D. E. Writ of error to the circuit court of the United States, western district of Missouri.

3 The United States of America to the county court of Macon County, Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein the United States on the relation of Alfred

Huidekoper is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the western district of Missouri, this 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-five.

JOHN F. DILLON,
Judge United States Circuit Court,
Western District of Missouri.

4 DECEMBER 2, 1875.

Service of this citation is hereby acknowledged and accepted for county court of Macon County.

JA'S O. BROADHEAD,
Attorney for Respondent.

(Indorsed:) 463. United States circuit court, western district of Missouri. The United States ex rel. Alfred Hindekoper, P. E., vs. The County Court of Macon Co., Missouri, D. E. Citation.

5 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

Pleas before the honorable circuit court of the United States, in and for the western district of Missouri, at the November term thereof, A. D. 1875, in case.

THE UNITED STATES ON THE RELATION OF Alfred Huidekoper, relator,
vs.
THE COUNTY COURT OF MACON COUNTY, Missouri, and the justices thereof, respondents.
} Mandamus.

Information for mandamus filed.

Be it remembered that heretofore, to wit, on the 8th day of May, A. D. 1875, there was filed in the office of the clerk of the circuit court of the United States, in and for the western district of Missouri, on information, in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri.

THE UNITED STATES OF AMERICA ON THE relation of Alfred Huidekoper,
vs.
THE COUNTY COURT OF MACON COUNTY.

6 *Information.*

Information for a writ of mandamus.

To the honorable the judges of the circuit court of the United States, for the western district of Missouri:

Now comes Alfred Huidekoper and gives the court to be informed

that he is a citizen of the State of Pennsylvania, and that the county of Macon is a municipal corporation, created by and a citizen of the State of Missouri, whose financial affairs are managed by a county court, composed of justices who are citizens of the said State of Missouri.

That on the twenty-fifth day of November, 1874, he recovered, by the judgment and consideration of this court, against the said county of Macon the sum of six thousand six hundred and fifty-six dollars and seventy-nine cents, with interest at the rate of seven per cent. per annum, and costs taxed at two hundred and fifty-seven dollars and twenty-three cents.

That said judgment was recovered upon interest-coupons from bonds of said county by its county court, under and by authority of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Mississippi and Missouri Railroad Company," approved February 20th, 1865, and were delivered to said railroad company
7 in part payment of a subscription by said county for shares of the capital stock of said company, and that said bonds were received by said company, and certificates of stock subscribed as aforesaid were issued to said county, and were received by it, and said certificates and shares of stock are still held and owned by said county, and said county has ever since said subscription claimed and exercised the rights of a stockholder in said company, and said county levied and collected taxes at the rate of one-half of one per cent. to pay the interest of said bonds, and did pay the first four installments thereof, and to pay the interest of all the other bonds of like tenor and effect, and to pay the principal of other bonds issued by said county to said company under the same authority to a large amount, to wit, $18,000.

That by the laws of the State of Missouri, it is the duty of the county court of Macon County to levy and collect taxes and pay all indebtedness of said county.

That execution has heretofore issued on said judgment and been returned no property found, and wholly unsatisfied, and a demand has heretofore been on said county court to levy and collect a tax for
8 the purpose of paying the said judgment according to law, and to pay the same, with which said demand the said county court has neglected and refused to comply.

Wherefore your petitioner, being without other adequate remedy at law, prays for a writ of mandamus from this court, to be directed to the county court of Macon County, commanding it to levy and collect a tax for the purpose of paying the said judgment with interests and costs in full, to the complete satisfaction thereof, or to show cause at the next term of this court why the same has not been done.

ALFRED HUIDEKOPER,
By JOSEPH SHIPPEN,
His Attorney.

UNITED STATES OF AMERICA,
Western District of Missouri, ss :

I, Joseph Shippen, on oath do state that I am attorney for Alfred Huidekoper, and am acquainted with the facts in the foregoing petition stated, and the same are true as I verily believe.

JOSEPH SHIPPEN.

Subscribed and sworn to this 8th day of May, A. D. 1875, before me.

H. C. GEISBERG,
Clerk.

9 And afterwards, at a regular stated term of the circuit court of the United States, in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday, the 19th day of April, A. D. 1875, the following proceedings were had in this case, on the 8th day of May, A. D. 1875, to wit:

THE UNITED STATES EX REL. ALFRED HUIDEKOPER
vs.
THE COUNTY COURT OF MACON COUNTY. } 463.

Alternative writ of mandamus ordered.

Now comes the relator, by his attorney, Joseph Shippen, esqr., and makes application for an alternative writ of mandamus, to be directed to the county court of Macon County, and thereupon gives the court to be informed that he is a citizen of the State of Pennsylvania, and that the county of Macon is a municipal corporation, created by and a citizen of the State of Missouri, whose financial affairs are managed by a county court composed of justices who are citizens of the said State of Missouri.

That on the twenty-fifth day of November, 1874, he recovered, by the judgment and consideration of this court, against the said county of Macon the sum of six thousand six hundred and fifty-six dollars
10 and seventy-nine cents, with interest at the rate of seven per cent. per annum, and costs taxed at two hundred and fifty-seven dollars and twenty-three cents.

That said judgment was recovered upon interest-coupons, from bonds of said county, issued by its county court under and by authority of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Mississippi and Missouri Railroad Company," approved February 20th, 1865.

That by the laws of the State of Missouri, it is the duty of the county court of Macon County to levy and collect taxes and pay all indebtedness of said county.

That execution has heretofore issued on said judgment, and been returned no property found, and wholly unsatisfied, and a demand has heretofore been made on said county court to levy and collect a tax for the purpose of paying the said judgment according to law, and to pay the same, with which said demand the said county court has neglected and refused to comply.

All of which having been seen, heard, and by the court fully understood, it is ordered that the said county court of Macon County forthwith proceed to levy and collect a tax for the purpose of paying
11 the said judgment with interest and costs in full to the complete satisfaction thereof, or to show cause at the next term of this court why the same has not been done.

And afterwards, on the 24th day of July, 1875, there was issued out of the clerk's office of the said circuit court an alternative writ of mandamus, in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri.

THE UNITED STATES OF AMERICA ON THE RELATION of Alfred Huidekoper
against
THE COUNTY COURT OF MACON COUNTY. } 463.

Alternative writ of mandamus.

The President of the United States to the county court of Macon County, greeting:

Whereas it has been represented to our circuit court of the United States for the western district of Missouri, that Alfred Huidekoper, a citizen of the State of Pennsylvania, by the judgment of said court, rendered on the twenty-fifth day of November, A. D. 1874, recovered of the corporation of the county of Macon, a municipal corporation created by and a citizen of the State of Missouri, whose financial affairs
12 are managed by a county court, composed of justices, citizens of said State of Missouri, by due process of law, a judgment for the sum of six thousand six hundred and fifty-six dollars and seventy-nine cents ($6,656.79), with interest at the rate of seven per cent. per annum, and costs taxed at two hundred and fifty-seven dollars and twenty-three cents ($257.23).

That said judgment was recovered upon interest-coupons from bonds of said county issued by its county court under and by authority of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Mississippi and Missouri Railroad Company," approved February 20th, 1865, and were delivered to said railroad company in part payment of a subscription by said county for shares of the capital stock of said company, and that said bonds were received by said company, and certificates of stock subscribed as aforesaid were issued to said county, and received by it, and said certificates and shares of stock are still held and owned by said county, and said county has, ever since said subscription, claimed and exercised the rights of a stockholder in said company, and said county levied and collected taxes at the rate of one-half of one per cent. to pay the interest of said bonds, and did pay the first four installments thereof, and to pay the interest of all
13 the other bonds of like tenor and effect, and to pay the principal of other bonds issued by said county to said company under the same authority to a large amount, to wit, $18,000.

That by the laws of the State of Missouri it is the duty of the county court of Macon County to levy and collect taxes and pay all indebtedness of said county. That execution has heretofore issued on said judgment, and been returned no property found, and wholly unsatisfied, and that a demand has heretofore been made on said county court to levy and collect a tax for the purpose of paying the said judgment according to law, and to pay the same, with which said demand the said county court has neglected and refused to comply.

Wherefore you, the said county court of Macon County, are hereby commanded forthwith to levy and collect a tax for the purpose of paying the said judgment, with interest and costs in full, together with the costs of this proceeding as taxed and endorsed on this writ, to the complete satisfaction thereof, or that you show cause at the next term of this court why the same has not been done.

Witness the honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, this 24th day of July, A. D.
14 1875. Issued at office in the city of Jefferson, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk.

Endorsements on writ.

And upon said writ was the following endorsement:

United circuit court, western district of Missouri. United States ex rel. Alfred Huidekoper vs. The County Court of Macon Co. Alternative writ of mandamus.

Judgment in original suit	6,656 79
Costs " " "	257 23
H. C. Geisberg, clerk, costs on mand	6 95

And upon a duplicate of said alternative writ of mandamus the marshal of the United States for the western district of Missouri made the following return:

Marshal's return.

I hereby certify that I delivered the alternative writ of mandamus, of which the within is a duplicate, to John P. Walker, presiding jus-
15 tice of the county court of Macon County, Missouri, and also by delivering a duplicate of said writ to Perry M. Stacy, Isaac Gooding, Thomas White, and Theodore Krauss, county judges of said Macon County.

Done this 16th day of August, A. D. 1875, in the county of Macon, western district of Missouri.

GEORGE SMITH, *U. S. Marshal,*
By C. K. HAVERLY, *Deputy.*

And afterwards, at the November term of the circuit court of the United States, in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday, the 15th day of November, A. D. 1875, the following further proceedings were had in this case on the 15th day of November, A. D. 1875, to wit:

THE UNITED STATES OF AMERICA EX REL. Alfred Huidekoper *vs.* THE COUNTY COURT OF MACON COUNTY. } 463.

Return to writ filed & demurrer filed.

This day comes the defendant, by James O. Broadhead, esq., its attorney, and files its return to the alternative writ of mandamus herein, and thereupon comes also the plaintiff, by his attorney, Joseph Shippen, esq., and files herein a demurrer to said return.

The return, filed as aforesaid, is in words and figures following, to wit:

16 In the circuit court of the United States for the western district of Missouri.

THE UNITED STATES OF AMERICA ON THE relation of Alfred Huidekoper
vs.
THE COUNTY COURT OF MACON COUNTY.

Return to alternative writ.

Now comes the defendant, The County Court of Macon County, and for return to the alternative writ of mandamus, issued herein, says: That by the act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, it was provided in the 13th section thereof that "It shall be lawful for the corporate authorities of any city or town, or the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.

That under and by virtue of that act of the general assembly of the State of Missouri, and by no other authority whatever, the county court of said county, on the second day of April, A. D. 1867, subscribed to the capital stock of the said company one hundred and seventy-five
17 thousand dollars, and on the 20th day of April, 1870, said county court subscribed to the capital stock of said railroad company one hundred and seventy-five thousand dollars, and on the 20th day of April, 1870, said county court subscribed to the capital stock of said railroad company an additional one hundred and seventy-five thousand dollars, and issued the bonds of said county, with coupons for interest attached thereto, for three hundred and fifty thousand dollars, in pursuance of said subscriptions of stock, which said bonds were delivered to said railroad company, and by said company received in payment for the stock so subscribed.

That in the year 1868 a portion of said bonds and coupons matured, and the county court of Macon County for that year levied, and every year since has levied for the purpose of paying said indebtedness, a tax of one-twentieth of one per cent. upon the taxable property within said county of Macon, as ascertained each year before the levy for that year by the annual assessment of the property within said county for State and county purposes for such year.

That the judgment obtained by the relator in the circuit court of the United States for the Western District of Missouri, was obtained on certain coupons so issued by the county court of Macon County as aforesaid, and attached to the bonds above referred to, and on no other account or demand whatsoever against said county of Macon.

And respondent says that the proceeds of said levies so made aforesaid are in the Treasury of said county, and his due proportion thereof will be paid to said relator, at any time on demand by the Treasurer of said county.

18 That this respondent has not made a greater levy to pay said indebtedness, because, as it believes and alleges, it has no authority under said act incorporating the Missouri and Mississippi Railroad Company to do so, and because the supreme court of the State of Missouri has decided that under the said act incorporating the Missouri and Mis-

sissippi Railroad Company, the county court of Macon County, defendant in that case as in this, had no authority to levy a tax to pay the bonds or coupons, or either, so issued as aforesaid, exceeding one-twentieth of one per cent. upon the assessed value of the taxable property within said county for the year the said levy should be made.

Wherefore the respondent, the county court of Macon County, has not, but has refused to levy a greater tax to pay said indebtedness. And having fully answered, asks to be hence dismissed, and for judgment for costs.

SHARP & BROADHEAD,
Atty's for Resp't.

The demurrer, filed as aforesaid, is in words and figures following, to wit:

19 In the circuit court of the United States for the western district of Missouri.

UNITED STATES AT THE RELATION OF ALFRED Huidekoper *vs.* THE COUNTY COURT OF MACON COUNTY. } 462.

Demurrer.

And now comes the relator in the above-stated case, and demurs to the return *and additional return* made by the respondent to the alternative writ of mandamus, and for ground of demurrer says that the facts therein set forth are not sufficient in law to constitute a due and adequate return to said writ.

JOSEPH SHIPPEN,
Att'y for Relator.

MEM. BY CLERK.—The words "and additional return" were inserted at the date of filing said additional return, so that said demurrer should stand as a demurrer to both returns.

And afterwards, at the November term of said circuit court, to wit, on the 19th day of November, A. D. 1875, the following further proceedings were had in said cause:

UNITED STATES EX REL. ALFRED HUIDEkoper *vs.* COUNTY COURT OF MACON COUNTY. } 463.

20 *Additional return to writ filed.*

This day comes the defendant, by James O. Broadhead, esq., and James Carr, esq., and by leave of court filed a return herein, which is to be in addition to the return heretofore filed; and also comes the plaintiff, by his attorney, Joseph Shippen, and files a demurrer to said return, whereupon said demurrer is argued and submitted to the court.

The additional return filed as aforesaid is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri, November term, 1875.

THE UNITED STATES OF AMERICA ON THE relation of Alfred Huidekoper *against* THE COUNTY COURT OF MACON COUNTY. } Additional return.

Additional return to writ.

Now at this day comes the respondent, and for additional return to the alternative writ of mandamus issued in the above entitled cause, or so much thereof as it is advised is material for it to answer, states that it is true that the relator recovered judgment at the time and for the amount alleged in said writ, and respondent states that the incorporators named in the act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi
21 Railroad Company," approved February 20th, 1865, on the day of October, 1866, organized under and accepted the provisions of said act.

That said judgment was recovered upon a portion of the coupons for installments of interest on a portion of certain bonds to the amount of one hundred and seventy-five thousand dollars, issued by Macon County to said Missouri and Mississippi Railroad Company, in satisfaction of a certain subscription made by the county court of Macon County, on behalf of Macon County, to the capital stock of the said Missouri and Mississippi Railroad Company, on the 12th day of April, 1870, as hereinafter more fully stated.

That under and by virtue of the authority conferred on said county court by said act, said county court, for and on behalf of said county, on the 2nd day of April, 1867, subscribed the sum of one hundred and seventy-five thousand dollars to the capital stock of the said Missouri and Mississippi Railroad Company.

That said subscription was made by the said county court without the assent of two-thirds of the qualified voters of Macon County, no election, regular or special, having been held for the purpose of obtaining said assent; but, on the contrary, the fact is that said subscription was made against the wish of a large majority of said qualified voters.
22 That after said county court had made said subscription as aforesaid, finding that a large majority of the tax-payers of said county was opposed to said subscription and the issuing of bonds in satisfaction thereof, said court refused to issue said bonds until compelled to do so by mandamus from the supreme court of Missouri, issued at the October term thereof, 1867.

That said county court afterwards, in obedience to said mandamus, issued and delivered to said Missouri and Mississippi Railroad Company bonds to the amount of one hundred and seventy-five thousand dollars, running from five to ten years, a portion of them bearing six per cent. and a portion bearing ten per cent. per annum, payable semi-annually, and said railroad company negotiated said bonds to divers persons for value long before the making of the second subscription, as hereinafter stated.

That the only authority said county court had to make said subscription and issue and deliver said bonds to said Missouri and Mississippi Railroad Company, as aforesaid, was and is contained in the following words of said act, to wit:

"It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said railroad company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of all the taxable property for each year."

23 That the total assessed value of all the taxable property of and in said county for the year 1867 was the sum of $5,145,810; for the year 1868 was the sum of 5,304,644; for the year 1869 was the sum of 5,191,626; for the year 1870 was the sum of 4,874,467; for the year 1871 was the sum of 4,264,260; for the year 1872 was the sum of 5,466,434; for the year 1873 was the sum of 5,300,541; for the year 1874 was the sum of 5,900,002; for the year 1875 was & is the sum of 5,060,283.

That the said county court, under and by virtue of the provisions of said act, levied a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property of and in said county for each and every year, from the year 1867 to the year 1875, inclusive, for the purpose of paying said bonds and interest, as the same became due, and authorized and caused said special tax to be extended upon the tax-books of said county for each of said years for the purpose of having the same collected, and the collector of the public revenue of the said county collected said tax for each of said years and paid the same into the county treasury of said county.

That said tax for the year 1867, and for each and every year between that and the year 1875, inclusive, levied and collected as aforesaid,

24 was inadequate to pay the interest accruing on said bonds.

That said county court had and now has no legal power or authority to levy any other or greater tax than one-twentieth of one per cent. upon the assessed value of all the taxable property of and in said county to pay said bonds and interest thereon.

That there now remains unpaid of said bonds one hundred and fifty-six thousand four hundred and fifty dollars, besides a large amount of interest which has accrued thereon. That of said bonds remaining unpaid there are now past due sixty-seven thousand four hundred and fifty dollars, with several years of accrued interest thereon. That of said bonds not paid there are not yet due eighty-nine thousand dollars, forty-two thousand dollars of which will fall due on January 1, 1879, which draw interest at the rate of seven per cent. per annum, and forty-seven thousand dollars of which will fall due January 1st, 1882, which draw interest at the rate of ten per cent. per annum.

That on the 21st day of May, 1873, and during the May term, 1873, of the circuit court of Macon County, Missouri, the State of Missouri, on the relation of Robert Aull and Isaac Pollard, as plaintiff, against the Macon County court as respondent, filed a petition for and

25 had an alternative writ of mandamus issued requiring said county court to levy a tax sufficient to pay off past-due bonds, amounting to the sum of dollars, issued by said county court to said Missouri and Mississippi Railroad Company, in obedience to said mandamus of the supreme court of the State of Missouri (said Aull and Pollard being the owners and holders of said bonds).

That said county court made return to said alternative writ that under and by virtue of said act of the general assembly said county court had levied a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property of and in Macon County, and had caused said tax to be extended upon the tax-books of said

county for each and every year, from the year 1867 to the year 1873 inclusive, for the purpose of paying said bonds, and interest, issued in obedience to said mandamus of the supreme court as aforesaid, and had said special tax collected, and that it was ready and willing to continue to levy said special tax, have it collected, and apply the same as far as it would go pro rata in payment of said bonds and interest, and said circuit court held and decided that said county court had discharged its whole duty in the premises and dismissed said alternative writ of mandamus.

26 That said relators appealed said cause to the supreme court of the State of Missouri, which, after due deliberation thereon, said supreme court affirmed said judgment of said circuit court at the March term, 1874, of said supreme court.

This respondent, for a further return to the alternative writ of mandamus herein, states that on the 12th day of April, 1870, the county court of Macon County made, for and on behalf of Macon County, a second subscription of one hundred and seventy-five thousand dollars to the capital stock of the said Missouri and Mississippi Railroad Company, and on the 2nd day of May, 1870, said county court in payment and satisfaction of said subscription issued to said Missouri and Mississippi Railroad Company one hundred and seventy-five bonds of the denomination of one thousand dollars each, running twenty years, and bearing interest at the rate of eight per cent. per annum, payable semi-annually at the National Bank of Commerce, in the city of New York.

That said subscription was made and said bonds were issued to said Missouri and Mississippi Railroad Company without the assent of two-thirds of the qualified voters of Macon County, no election, regular or special, having been held to procure said assent.

27 That the order of said county court making said subscription of one hundred and seventy-five thousand dollars was entered upon the records of said county court, and is in words and figures as follows:

"On motion of the Missouri and Mississippi Railroad Company, by James A. Clark, her attorney, it is ordered by the court, that the county of Macon do take $175,000 stock in said railroad company, in addition to the stock heretofore taken by the county in the said company, and the said $175,000 additional stock is hereby subscribed to said railroad company, to be paid in bonds of said county of Macon, having twenty years to run, with interest at the rate of 8 per cent. per annum; interest payable semi-annually, at the National Bank of Commerce, in the city of New York. Said bonds shall be issued in sums of one thousand dollars each, and have 40 interest coupons attached to each bond." * * *

That said order making said subscription is expressly referred to on the face of said bonds issued to said Missouri and *Missouri* Railroad Company as aforesaid, as also the act under which said bonds were issued, and thereby imparts notice to the holders of said bonds, of said prior subscription of $175,000 and the bonds issued in payment and satisfaction thereof, as hereinbefore stated.

28 That the judgment of the relator herein was recovered on coupons for installments of interest on a portion of said bonds issued on the 2nd day of May, 1870, to said Missouri and Mississippi Railroad Company, in payment and satisfaction of said second subscription of one hundred and seventy-five thousand dollars, as hereinbefore stated.

That all of said bonds and the interest thereon are still outstanding and no part thereof has been paid.

The taxes of one-twentieth of one per cent. levied by the respondent

on the assessed value of all the taxable property of and in Macon County, for the years between 1867 and 1875 inclusive, are not sufficient to pay the interest annually accruing on said bonds issued to said Missouri and Mississippi Railroad Company in payment and satisfaction of said first subscription, and Macon County has neither money nor property with which to pay said bonds or interest, and this respondent has no authority, under any law of the State of Missouri, to levy any tax to pay said bonds, except as hereinbefore stated; and this respondent is still ready and willing to continue in the future to levy a tax of one-twentieth of one per cent. upon the assessed value of all the taxable property of and in said county, and it intends and will apply the
29 same as far as it will go in payment and satisfaction of the principal and interest of said bonds issued in payment and satisfaction of said first subscription, unless otherwise ordered by this or some other court of competent jurisdiction.

That there is and was no other consideration for the bonds and interest coupons described in said alternative writ than the payment and satisfaction of said second subscription, as hereinbefore stated.

In consideration of the premises respondent prays the judgment of the court whether the levy of the tax of $\frac{1}{20}$ of one per cent., and the collection thereof, and its appropriation pro rata to the payment of the bonds and interest thereon, issued in payment and satisfaction of said first subscription, as hereinbefore stated, is not a full compliance with and discharge of the duty of respondent in the premises until the taxes thus levied, collected, and appropriated shall have fully paid off said bonds and interest, and that the residue of said tax shall be applied pro rata in payment of the principal and interest of the bonds issued in payment and satisfaction of said second subscription, and respondent prays the court to make such order or orders in the premises as shall be required by said act of the general assembly of the State of Missouri, under which
30 said subscriptions were made and said bonds issued to said Missouri and Mississippi Railroad Company to protect and preserve the rights of this respondent and the tax-payers of Macon County, and this respondent prays to be dismissed with costs.

CARR, BARROW, and W. H. SEARS,
Prosecuting Attorney for Macon County, Atty's for Respondent.

And afterwards, at the November term of said circuit court, to wit, on the 20th day of November, A. D. 1875, the following further proceedings were had in said cause:

UNITED STATES EX REL. A. HUIDEKOPER
vs.
COUNTY COURT OF MACON COUNTY. } 463. Mandamus.

Demurrer overruled.

This day come the above relator, by his attorney, Joseph Shippen, and the respondents by their attorneys, James O. Broadhead, James Carr, and B. G. Barrow, and the said cause having been argued and submitted to the court on the demurrer filed herein by the said relator to the original and additional returns of the respondent to the alternative writ of mandamus herein, and being fully advised in the premises, it is ordered that said demurrer be overruled, and the relator electing to abide by his said demurrer, and refusing further to plead
31 herein, the respondent, by its said attorneys, moves the court to enter up judgment on the said pleadings.

It is therefore considered, ordered, and adjudged by the court that the respondent, the county court of Macon County, go hence without day and recover against the relator its cost herein expended and have execution therefor.

Certificate of division filed.

Thereupon there was filed a certificate containing certain questions of law concerning which the judges were divided in opinion; which certificate is now signed and ordered to be filed and made a part of the record in this case.

The certificate of division so filed as aforesaid is as follows:

At a circuit court of the United States begun and held at the city of Jefferson, for the western district of Missouri, on Monday, the 15th day of November, 1875.

Present, the honorable John F. Dillon, circuit judge, and Arnold Krekel, district judge.

UNITED STATES OF AMERICA EX RELATION Alfred Huidekoper *versus* COUNTY COURT OF MACON COUNTY. } 463

Certificate of division.

NOVEMBER 20TH, 1875.

And now this day this cause having come on to be heard on
32 the demurrer filed herein by the relator to the return and additional return of the respondent to the writ of alternative mandamus herein, and the said demurrer having been overruled and the relator having elected to abide by such decision, and final judgment having been entered thereon by the court against the relator: It is now hereby certified, as provided by law, by the said judges that their opinions were opposed upon the following questions which occurred on the trial and hearing of the said writ or proceeding, as follows:

First. Whether the provision in the thirteenth section of the act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, recited in the bonds, writ, and return in respect of the levy of taxes to pay the bonds, was intended only to provide a sinking-fund for the eventual payment of the principal of the bonds, leaving the county court power to provide for the payment of the interest thereon under the then existing general statutes of the State or by implication, or whether the said provision in said act is an absolute and existing limitation on the power of the said county court in respect to both the principal and interest.

Second. Whether the said limitation in the said 13th section of
33 the said act, if it existed when said act was passed, was removed, or the power to levy taxes enlarged by the subsequent legislation of the State so as to give the respondent power to levy such an amount and rate of tax from year to year as might be necessary to pay the interest on the said bonds.

Third. Whether the said limitation in said 13th section applies to the case of a creditor who has recovered judgment on coupons on said bonds, and whose execution has been returned nulla bona.

Fourth. Whether the relator, a judgment creditor, is entitled only to his proportion of the levy of one-twentieth of one per cent., said proportion to be ascertained by the ratio which his bonds bear in amount to the whole bonded debt, or whether he is entitled to priority of payment by reason of his judgment over the bondholder who has obtained no judgment.

Fifth. Whether the judgment creditors upon bonds issued in payment of the second subscription, are on an equal footing with like creditors who recovered judgment on the bonds issued in payment of the first subscription.

(Signed) JOHN F. DILLON.
A. KREKEL.

And afterwards, at the November term of said circuit court, to wit, on the 23d day of November, A. D. 1875, the following further proceedings were had in said cause:

34 UNITED STATES EX REL. ALFRED HUIdekoper
vs. } 463.
COUNTY COURT OF MACON COUNTY.

Order allowing writ of error and signing citation.

This day comes the relator, by his attorney, Joseph Shippen, esqr., and presents to the court a writ of error to reverse the judgment of this court rendered in favor of the respondents in the above cause, and also a citation directed to the said respondents admonishing them to appear at a Supreme Court of the United States, on the second Monday of October next; and said writ of error is allowed and citation signed by the court.

And afterwards, to wit, on the 16th day of December, A. D. 1875, being in vacation of said circuit court, the following further proceedings were had in this cause, to wit:

UNITED STATES EX REL. ALFRED HUIDEkoper
vs. } 463.
THE COUNTY COURT OF MACON COUNTY.

Order approving bond.

This day there is presented an appeal bond in the above cause, which is duly approved by the honorable Arnold Krekel, judge, and
35 ordered to be filed, which said bond, filed as aforesaid, is in words and figures as follows, to wit:

Copy of bond.

Know all men by these presents, that we, Alfred Huidekoper, by his att'y in fact, Joseph Shippen, as principal, and S. A. Ranlett, as surety, are held and firmly bound unto the county court of Macon County, Missouri, in the full and just sum of five hundred dollars to be paid to the said county court of Macon County aforesaid, and their successors in office, to which payment, well and truly to be made, we bind ourselves,

our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 29th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at the November term, A. D. 1875, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between the United States on the relation of Alfred Huidekoper, relator, and the county court of Macon County, Missouri, respondent, judgment was rendered against the said relator; and the said relator having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said county court, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington
36 the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Alfred Huidekoper, relator, as aforesaid, shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ALFRED HUIDEKOPER,
By his att'y in fact, JOSEPH SHIPPEN. [SEAL.]
S. A. RANLETT. [SEAL.]

Approved.
(Sig'd) A. KREKEL,
Judge.

I consent to this bond as satisfactory.
JAS. O. BROADHEAD,
Att'y for Respondent.

37 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true transcript of the record and proceedings in case No. 463 of The United States of America on the relation of Alfred Huidekoper, relator, against The County Court of Macon County, Missouri, and the Justices thereof, respondents, as fully as the same remain on file and of record in said case in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson in said district, this 28th day of December, A. D. 1875.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsed:) Case No. 463. United States circuit court, western district of Missouri. The United States ex rel. Alfred Huidekoper vs. The County Court of Macon Co., Missouri, and the Justices thereof. Duly certified copy of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 362. The United States ex rel. Alfred Huidekoper, plaintiff in error, vs. The County Court of Macon County. W. Missouri C. C. U. S. Filed 3rd March, 1876.

In the Supreme Court of the United States.

No. 98.

THE UNITED STATES Ex Rel. ALFRED HUIDEKOPER, *Plaintiff in Error*

Vs.

THE COUNTY COURT OF MACON COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.

Judd & Detweiler, Printers.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 98.

THE UNITED STATES EX REL. ALFRED HUIDEKOPER, *Plaintiff in Error.*

vs.

THE COUNTY COURT OF MACON COUNTY.

Error to the Circuit Court of the United States for the Western District of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This was a mandamus proceeding instituted in the United States circuit court for the western district of Missouri, by Alfred Huidekoper, the plaintiff in error, against the county court of Macon county, Missouri, to compel the levy and collection of a tax to pay his judgment for $6,656.79, recovered in said court against Macon county upon INTEREST COUPONS from bonds issued by it under the authority of an act of the general assembly of the state of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company." Approved February 20, 1865.

THE ALTERNATIVE WRIT.

(Record 5) following the information stated that said bonds were issued under said authority and were delivered to said railroad company in part payment of a subscription by said county for shares of the capital stock of said company, and that said bonds were received by said company, and certificates of stock subscribed as aforesaid were issued to said county, and received by it, and said certificates and shares of stock are still held and owned by said county, and said county has, ever since said subscription, claimed and exercised the rights of a stockholder in said company, and said county levied and collected taxes at the rate of one-half of one per cent. to pay the interest of said bonds, and did pay the first four instalments thereof, and to pay the interest of all the other bonds of like tenor and effect, and to pay the principal of other bonds issued by said county to said company under the same authority to a large amount, to-wit: $18,000.

Also that an execution had been issued and returned *nulla bona*, and demand made had been refused.

Thereupon said writ commanded the respondent forthwith to levy and collect a tax for the purpose of paying said judgment in full or show cause why the same was not done.

THE RETURNS

To the alternative writ stated for causes why the mandate was not obeyed, the following: (Record, 7 and8,)

1. That by the act of the general assembly of the state of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, it was provided in the 13th section thereof, that "It shall be lawful for the corporate author-

ities of any city or town, or the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

That under and by virtue of that act of the General Assembly of the State of Missouri, and by no other authority whatever, the county court of said county, on the second day of April, A. D. 1867, subscribed to the capital stock of the said company one hundred and seventy-five thousand dollars, and on the 20th day of April, 1870, said county court subscribed to the capital stock of said railroad company an additional one hundred and seventy-five thousand dollars, and issued the bonds of said county, with coupons for interest attached thereto, for three hundred and fifty thousand dollars, in pursuance of said subscriptions of stock, which said bonds were delivered to said railroad company, and by said company received in payment of the stock so subscribed.

That in the year 1868 a portion of said bonds and coupons matured, and the county court of Macon county for that year levied, and every year since has levied for the purpose of paying said indebtedness, a tax of one-twentieth of one per cent. upon the taxable property within said county of Macon, as ascertained each year before the levy for that year by the annual assessment of the property within said county for state and county purposes for such year.

That the judgment obtained by the relator in the Circuit Court of the United States for the Western District of Missouri, was obtained on certain coupons so issued by the county court of Macon county as aforesaid, and attached to the bonds above referred to, and on no other account or demand whatsoever against said county of Macon.

2. That the total assessed value of all the taxable property of and in said county:

For the year		1867	was the	sum of	$5,145,810
"	"	1868	"	"	5,304,644
"	"	1869	"	"	5,191,626
"	"	1870	"	"	4,874,467
"	"	1871	"	"	4,264,260
"	"	1872	"	"	5,466,434
"	"	1873	"	"	5,300,541
"	"	1874	"	"	5,900,002
"	"	1875	"	"	5,060,283

That the said county court, under and by virtue of the provisions of said act, levied a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property of and in said county for each and every year, from the year 1867 to the year 1875, inclusive, for the purpose of paying said bonds and interest, as the same became due, and authorized and caused said special tax to be extended upon the tax-books of said county for each of said years for the purpose of having the same collected, and the collector of the public revenue of the said county collected said tax for each of said years and paid the same into the county treasury of said county.

That said tax for the year 1867, and for each and every year between that and the year 1875, inclusive, levied and collected as aforesaid, was inadequate to pay the interest accruing on said bonds.

3. That on the 12th day of April, 1870, the county court of Macon county made, for and in behalf of Macon county, a second subscription of one hundred and seventy-five thousand dollars to the capital stock of the said Missouri and Mississippi Railroad Company, and on the 2d day of May, 1870, said county court in payment and satisfaction of said subscription issued to said Missouri and Mississippi Railroad Company one hundred and seventy-five bonds of the denomination of one thousand dollars, each, running twenty years, and bearing interest at the rate of eight per cent. per annum,

payable semi-annually at the National Bank of Commerce, in the city of New York.

That said subscription was made and said bonds were issued to said Missouri and Mississippi Railroad Company without the assent of two-thirds of the qualified voters of Macon county, no election, regular or special, having been held to procure said assent.

That the order of said county court making said subscription of one hundred and seventy-five thousand dollars was entered upon the records of said county court, and is in words and figures as follows:

"On motion of the Missouri and Mississippi Railroad Company, by James A. Clark, her attorney, it is ordered by the court, that the county of Macon do take $175,000 stock in said railroad company, in addition to the stock heretofore taken by the county in said company, and the said $175,000 additional stock is hereby subscribed to said railroad company, to be paid in bonds of said county of Macon, having twenty years to run, with interest at the rate of 8 per cent. per annum; interest payable semi-annually, at the National Bank of Commerce, in the city of New York. Said bonds shall be issued in sums of one thousand dollars each, and have 40 interest coupons attached to each bond." * *

That said order making said subscription is expressly referred to on the face of said bonds issued to said Missouri and Mississippi Railroad company as aforesaid, as also the act under which said bonds were issued, and thereby imparts notice to the holders of said bonds, of said prior subscription of $175,000 and the bonds issued in payment and satisfaction thereof, as hereinbefore stated.

That the judgment of the relator herein was recovered on coupons for instalments of interest on a portion of said bonds issued on the 2d day of May, 1870, to said Missouri and Mississippi Railroad Company, in payment and satisfaction of said second subscription of one

hundred and seventy-five thousand dollars as hereinbefore stated.

THE DEMURRER

Of the relator to the said returns was on the ground that the facts therein set forth were not sufficient in law to constitute a due and adequate return to said writ.

This demurrer was overruled by the court below and the relator electing to abide thereby, judgment was entered for the respondent; and the judges were divided on the following:

CERTIFIED QUESTIONS.

1st. Whether the provision in the thirteenth section of the act of the General Assembiy of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, recited in the bonds, writ, and return in respect of the levy of taxes to pay the bonds, was intended only to provide A SINKING FUND for the eventual payment of the principal of the bonds, leaving the county court power to provide for the payment of the interest thereon under the then existing general statutes of the state or by implication, or whether the said provision in said act is an absolute and existing limitation on the power of the said county court in respect to both the principal and interest?

2d. Whether the said limitation in the said 13th section of the said act, if it existed when said act was passed, was removed, or the power to levy taxes enlarged by the subsequent legislation of the state so as to give the respondent power to levy such an amount and rate of tax from year to year as might be necessary to pay the interest on the said bonds?

3d. Whether the said limitation in said 13th section applies to the case of a creditor who has recovered judgment on coupons on said bonds, and whose execution has been returned *nulla bona?*

4th. Whether the relator, a judgment creditor, is entitled only to his proportion of the levy of one-twentieth of one per cent., said proportion to be ascertained by the ratio which his bonds bear in amount to the whole bonded debt, or whether he is entitled to priority of payment by reason of his judgment over the bondholder who has obtained no judgment?

5th. Whether the judgment creditors upon bonds issued in payment of the second subscription, are on an equal footing with like creditors who recovered judgment on the bonds issued in payment of the first subscription?

Alfred Huidekoper, the relator, brings this case here by writ of error.

ASSIGNMENT OF ERROR.

1st. Plaintiff in error assigns as error, that the judgment below was for the respondent in that court, when it should have been for the relator, the present plaintiff in error.

2d. That the relator's demurrer should have been sustained, and a peremptory writ of mandamus granted.

AN ACT

TO INCORPORATE THE MISSOURI AND MISSISSIPPI RAILROAD COMPANY.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. A railroad company is hereby incorporated under the name and style of the Missouri and Mississippi Railroad Company, with a capital stock of FOUR MILLIONS of dollars, divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continued succession, may sue and be sued, plead and be impleaded, defend and be defended against in all courts of record in this state and elsewhere, and shall be able in law and in equity to make and enter into contracts, and become invested with the title to real and personal property, and to sell and convey the same for the purpose of constructing, using and operating said railroad; may have and use a common seal, and may make such by-laws, rules and regulations as the directors of said company may ordain and establish from time to time, for the purpose of carrying this charter into effect.

SEC. 2. That Abner L. Gilstrap, Thomas A. Eagle and Thomas Moody, of Macon county, and E. V. Wilson, S. M. Wist and William F. Plumer, of Knox county, and Erastus Sacket, James M. Crane and John H. Cox, of Clark county, shall constitute the first board of directors under this charter, and shall hold their offices until their successors are duly chosen and qualified. They shall meet at such time and place as may be designated by

any three of them, giving reasonable notice thereof to the other directors, and a majority of said directors shall organize as a board, and cause books to be opened for the taking of said capital stock at such times and places as the board may direct.

SEC. 3. The said company shall have the right to take grants of real and personal property at such price or prices as the said directors, or any of them, may agree upon in payment of stock subscribed from individuals or counties, and to take stock subscribed upon such conditions as may be determined in the by-laws.

SEC. 4. So soon as two thousand shares shall be subscribed the board shall call an election for directors, giving twenty days' notice in such newspaper or papers as the board may direct, and in like manner, unless otherwise provided in the by-laws, shall call an election of the stockholders once in every two years thereafter, and the stockholders of said company, in person or by proxy, who may assemble at the time and place for holding any such election, may proceed to select nine directors, who shall compose the board until their successors are duly elected and qualified. All such elections shall be conducted as may be provided in the by-laws.

SEC. 5. The directors shall appoint the president, agents, clerks, engineers, superintendents and other officers and servants for said company, and determine how and under what circumstances all contracts with the company shall be made and executed; shall keep a journal of their proceedings, and cause correct books and accounts to be kept, may fill all vacancies in any office of the company, and fix the salaries of the president and other officers, agents and clerks, and take bonds for the faithful performance of their duties, and do such other acts and things as may be necessary and proper, not in violation of the laws of the state of Missouri.

SEC. 6. The board of directors may order the pay-

ment of stock from time to time, giving notice thereof to the respective stockholders, as they may determine. If any stockholder fail to make his payment in pursuance of such order, the company may sue and recover the same, with interest at the rate of ten per cent., or may declare the stock forfeited if payment shall be refused for sixty days after the same should have been fully made, and forfeit also, any payment or payments previously made thereon, and no such delinquent stockholder shall vote in said company.

SEC. 7. Said board of directors shall have full power and authority to survey, mark out, locate and construct a railroad *from the town of Macon, in the county of Macon, in the state of Missouri, through the town of Edina, in the county of Knox, in said state, and thence to or near the north-east corner of said state, in the direction of Keokuk, in Iowa, or Alexandria, Missouri*, and for such purpose may obtain by grant, gift or donation, any quantity of land for the purpose of a roadbed, not exceeding one hundred feet wide, depots, warehouses, machine shops, water stations and turnouts, and may select such route as they may think best.

SEC. 8. Any such gift, grant or donation, for the purposes in the last preceding section, may be made in the usual form by the owner, or if such owner be a minor, by the guardian or contractor, approved by the probate court of the county in which the land lies.

SEC. 9. But if the owner of any such tract of land shall refuse to convey on such terms as the company may desire, or if he, she, or they shall be a minor, or unknown, of unsound mind, or a non-resident of the state, the company may file their petition in the proper county, before the circuit court, or the judge thereof in vacation, stating therein the facts; and it shall be the duty of said court, or the judge thereof, to appoint three disinterested inhabitants of such county, who shall take into consideration the value of said tracts of land, and the advan-

tages or injury of the road to the same, and report thereon, under oath, what damages, if any, will accrue thereby to said tract or tracts of land respectively, stating the amount of damages thereto, and return a plat of the lands thus condemned. Notice of such application shall be given to the owner in the same manner as summons are served, ten days prior thereto, or if upon a guardian or contractor, twenty days, or if a non-resident or unknown owner, by publication in the nearest newspaper to said lands, two insertions at least twenty days before said application.

SEC. 10. The said report, plat and assessment shall be filed in the circuit court of the county in which any such lands may lie, and if no objection be filed thereto within the first three days of the next term thereafter, the court shall enter judgment for the amount of damages in each case, in favor of such owner and against said company, and make a decree vesting the title to the lands in question in said company; the amount of said damages shall be paid to the clerk of said court, for the use of the owner; but if objection be made to such report, or any part thereof, the court shall hear the same, overrule the objections, or if sustained, appoint three other viewers. Objections may be filed by either party, but no second objection shall be filed, and the judgment shall be final.

SEC. 11. Said company may mortgage the roadbed, track and rolling stock, lands and personal property, for money to be expended in the construction of said road, upon such terms as the board may determine, and may build their road along or across any county or state road, street or alley, by making or keeping in repair sufficient causeways at each crossing, for the use of the public, and in case of any tract of land being occupied shall be divided by said road, the company shall keep up each (least) one causeway for the use of the owner.

Sec. 12. Said company shall commence the construc-

tion of said railroad within two years after they shall have obtained stock to the amount of one million of dollars, and shall complete the same within ten years thereafter. The company may extend their road from the said town of Macon, or from any other point on said road, in south-west direction to the Missouri river, or to such intermediate point as they may think proper.

SEC. 13. IT SHALL BE LAWFUL FOR THE CORPORATE AUTHORITIES OF ANY CITY OR TOWN, THE COUNTY COURT OF ANY COUNTY DESIRING SO TO DO, TO SUBSCRIBE TO THE CAPITAL STOCK OF SAID COMPANY, AND MAY ISSUE BONDS THEREFOR, AND LEVY A TAX TO PAY THE SAME, NOT TO EXCEED ONE-TWENTIETH OF ONE PER CENT. UPON THE ASSESSED VALUE OF TAXABLE PROPERTY FOR EACH YEAR.

SEC. 14. No stockholder shall be liable for more than the amount of his stock, nor shall this charter be liable to be repeated (repealed) or annulled within the time limited for the completion of said road, nor then if the said company shall have finished their road.

This act shall take effect and be in force from and after its passage.

Approved February 20, 1865.

LAWS OF 1865, PAGE 86.

COPY OF BOND.

UNITED STATES OF AMERICA.

No. 131. Macon County Railroad Bond. Twenty years.

$1,000. County of Macon, State of Missouri, $1,000.

Know all men by these presents: That the County of Macon, State of Missouri, acknowledges itself indebted to the Missouri and Mississippi Railroad Company (organized by an act of the general assembly of the State of Missouri) or bearer, in the sum of one thousand dollars, which sum the said county promises to pay at the National Bank of Commerce, in the City of New York, on the second day of May, 1890, with interest at eight per cent. per annum, which interest shall be payable semi-annually, on presentation of the coupons hereto annexed, at the National Bank of Commerce, in the City of New York.

This bond being issued under and pursuant to orders of the County Court of Macon County, for the subscription to the stock of Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the State of Missouri, entitled: "An act to incorporate the Missouri and Mississippi Railroad Company, approved February 20, 1865."

In testimony whereof, the said County of Macon has executed this bond by the presiding justice of the County Court of Macon County, under the order of said Court, signing his name hereto, and by the Clerk of said Court, under the order thereof, attesting the same and affixing the seal of said Court. This done at the City of Macon, County and State aforesaid, this second day of May, 1870.

J. R. ALDERMAN,
Presiding Justice of the County Court of Macon County.

SEAL

JOHN FARRAR, *Clerk.*

tion of said railroad within two years after they shall have obtained stock to the amount of one million of dollars, and shall complete the same within ten years thereafter. T' the said town said road, in s or to such inter per.

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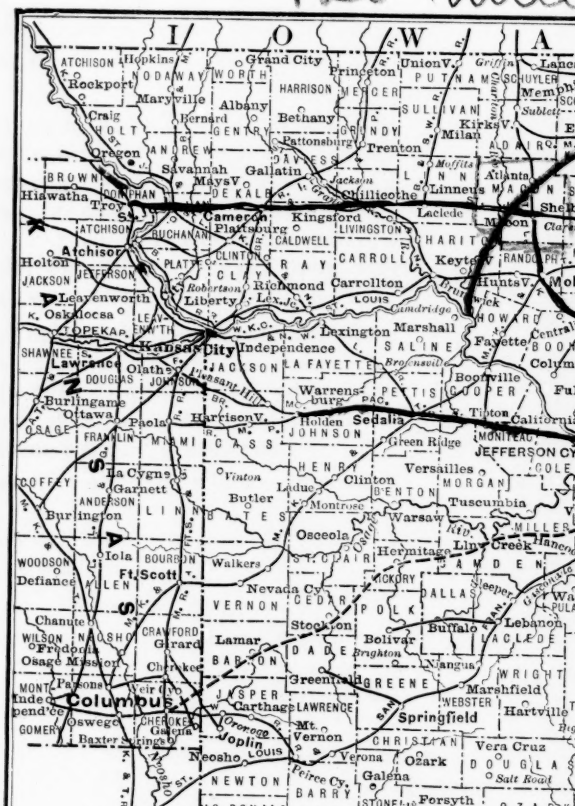
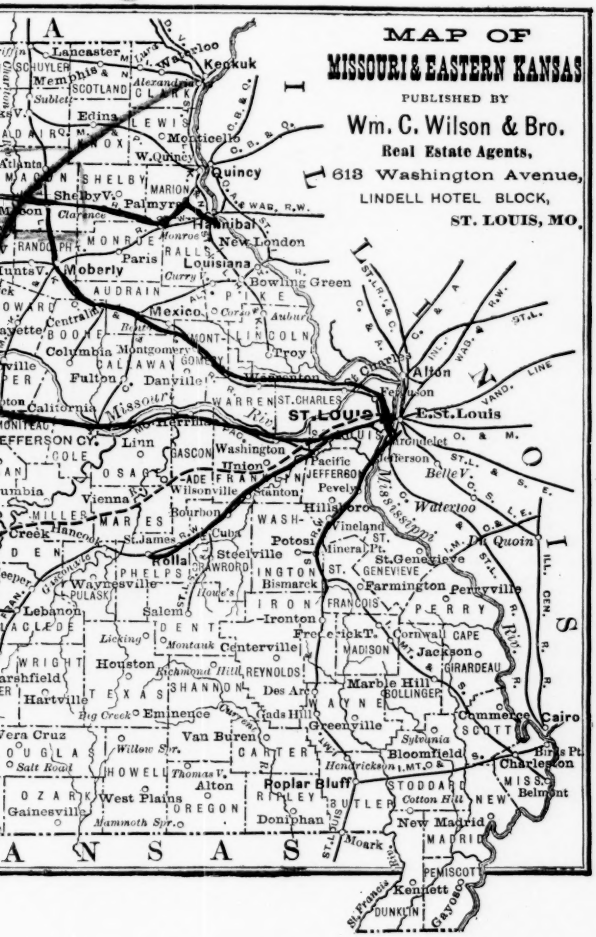


COPY OF BOND.

UNITED STATES OF AMERICA.



Bond. Twenty

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same and affixing
he City of Macon,
day of May, 1870.

ALDERMAN,

tice of the County
Macon County.

COPY OF COUPON.

No. 40. RAILROAD BOND. No. 40.

MACON, MO., May 2, 1870.

The County of Macon, State of Missouri, will pay to bearer on November 2, 1872, at the National Bank of Commerce, in the City of New York, forty dollars, being six months' interest on bond No. 11, for $1,000.

JOHN FARRAR,

County Clerk.

Macon County *v.* Shores, Printed Rec. pp. 126, 131.

POINTS AND AUTHORITIES.

I.

The charter of the Missouri and Mississippi Railroad Company (supra p. 8) by its 13th section, gave the power to Macon county to subscribe to its capital stock, and to issue its bonds therefor, and said power was not repealed by the Missouri constitution or general statutes of 1865–6.

SECTION 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.

State ex rel. Missouri and Mississippi Railroad Company vs. *Macon County Court*, 41 *Mo.*, 453 (1867.)

This first and leading case, which has been pronounced probably the most important decision ever rendered in Missouri, was upon this identical special charter involved herein, and has been followed in Missouri by—

Chillicothe, &c., R. R. Co. *v.* City of Brunswick, 44 Mo., 553.

Kansas City, &c. R. R. Co. *v.* Nodoway County Court, 47 id., 349.

State *v.* Callaway County, 51 id., 395.

State *v.* Sullivan County, 51 id., 522.

Osage Valley & S. K. R. R. Co. *v.* Morgan County Court, 53 id., 156.

Smith *v.* Clark County, 54 id., 58.

State *v.* Greene County, 54 id., 540.

Beattie *v.* Andrew County, 56 id., 42. (Feb. T., 1874.)

In above Morgan County case, decided in 1873, the court says :

"Millions of dollars have been invested on the faith of such decisions, and it would be a bold and hazardous experiment to undertake a new investigation of the subject. It is true that constitutional questions are always open to examination, but practically courts must regard precedents, on the faith of which the people have acted for years, especially where there can be a doubt concerning the matter decided."

In Smith *vs.* Clark County, 54 Mo., 70, a leading case on the subject, second only in importance to the original Macon County case in 41 Mo., it is said:

"So that the provisions of Rev. Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court or any individual judge thereof, so far as the reports show, not to affect the repeal of the privilege contained in special charters.

"That this was understood to be the law of this State appears also to have been recognized by the legislative department of the government, for in 1872 the legislature passed an act entitled 'An act to repeal certain sections of law granting to county courts and other corporate bodies the power to subscribe stock to railroad companies.'

"This act was approved January 30, 1872, and specifically repeals certain designated sections in certain acts particularly specified, and including, among the twenty or thirty charters [in fact *sixty-six* Laws 1872, p. 76,] enumerated, the charter of the A. & B. Co. This was, or would have been, a mere act of supererogation, if it had been understood or supposed that previous legislation on the subject had already effected this object.

"Thus it will be seen that up to January, 1872, the decisions of the Supreme Court had been acquiesced in, and no doubt acted on by the railroad corporations and the municipal authorities of various counties, cities, and towns, as the judicial history of the State abundantly shows. The necessary result was the investment of vast amounts of money in securities issued by counties, cities, and towns by virtue of the provisions in the charters of railroad companies. After the acts of 1855, 1860, 1861, 1865 the subject

was regarded as *res adjudicata*, and upon this view millions of dollars have been invested.

"Whatever, therefore, might be the opinion of this Court or of any individual judge, had the question come up for examination as an open one, we are all of opinion that it is now too late to disturb the received construction."

Decisions by the supreme court of Missouri, sustaining the issue of such bonds, ceased with the last-named case, contemporaneously with the financial panic and the cessation of railroad building.

It was to be expected that so high a tribunal of justice would repel with indignation every attempt to repudiate the bonds which its mandate had compelled to be issued.

Its decisions, *contra* against the purchasers of the bonds, began at March term, 1874, with the case, State *ex rel.* Aull *v.* Shortridge, 56 Mo., 126, (*infra*,) wherein it was held that a tax of only one-twentieth of one per cent. could be levied to pay the same bonds it had previously compelled to be issued under this charter. And its latest utterance on this subject casts *serious doubt* on the *validity* of these bonds!

State *ex rel.* Watkins *vs.* Walker (decided October 30, 1870, unreported. See pamphlet herewith, p. 27.)

This decision is of the same general tenor and effect with—

State *ex rel.* Woodson *vs.* Brassfield, (April 16, 1868, unreported,)

which held all township railroad aid bonds void, and which decision the United States circuit court for the eastern district of Missouri has refused to follow, because in conflict with the decision of this court in Cass County *vs.* Johnson, 95 U. S., 360.

Foote *vs.* Johnson County, 6 Central Law Journal, 345.

And, again, of the same general tenor and effect with—

State *ex rel.* Wilson *vs.* Garrouette, 7 Central Law J., 29.

which held the Branch Railroad aid bonds of Greene county void, and which decision this Court refused to follow, be-

cause in conflict with the prior adjudications of that court.
County of Schuyler *vs.* Thomas, Oct. T., 1878, (unreported.)

The above principle has been uniformly adopted and applied by the United States circuit courts of Missouri in numerous cases, and it has been by this Court adopted and applied in the following cases:

Callaway County *vs.* Foster, 93 U. S., 567.
Scotland County *vs.* Thomas, 94 id., 682.
Henry County *vs.* Nicolay, 95 id., 619.
County of Ray, *vs.* Vansycle, 96 U. S., 675, 684.
Schuyler County *vs.* Thomas, No. 62, Oct. T., 1878, (unreported.)
Macon County *vs.* Shores, No. 129, Oct. T., 1877, (unreported.)

The last named case sustained the validity of the *second issue* of bonds by Macon county under this charter, similar in all respects to those for the interest of which plaintiff's judgment herein sought to be enforced, was recovered. (See printed record of that case, pp. 126, 131.)

Therein it is decided—

"The 13th section of the charter authorized the county court to subscribe and issue bonds. No limit is prescribed either as to the time or amount of the subscription."

The opinion of this Court concludes with the quotation:

"Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them, and this I think is one of them."

II.

The bonds issued under this charter are a debt of the county, as fully as is any other liability.

The clause of section 13.—"And levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the

assessed value of all the taxable property for each year," *was a conferment of power to levy a special tax to enhance the credit and value of the bonds, in addition to the taxes otherwise authorized for their payment.*

In UNITED STATES *vs.* THE COUNTY OF CLARK, 96 U. S., 211, this Court, in passing on this 13th section, has already expressly, and in a clear and emphatic manner, thus decided, saying:

"That was a special tax *distinct from and in addition* to the ordinary tax, which, by other statutes, the county court was authorized to levy."

"To provide a particular fund as additional security for the payment of a debt."

"An additional provision made for the payment of the new debt authorized."

"Probably the tax of one-twentieth of one per cent. was authorized with a view to give to them additional credit, to make them more salable."

"It is incredible that the legislature intended to deny to the purchasers of the bonds any right to look for payment beyond such meagre provision."

"We cannot think the legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who might be so unfortunate as to hold them."

"Nor can we think that the legislature intended to set a trap for purchasers, and lead them to suppose they were obtaining valuable securities, when, in fact, they would obtain what was next to nothing."

Nor is it held otherwise, upon a due consideration of the pleadings and opinions rendered in—

United States *vs.* County of Clark, 95 U. S., 769.

Therein it is decided simply that Clark county was not bound to levy a tax of one-twentieth of one per cent. for years prior to the actual issue of the bonds. It was averred in the return that the county court had no power to levy in addition to one-twentieth of one per cent., a tax of one-half

of one per cent. which had been fully levied. The relator's demurrer admitted the issuable facts of the return, but the underlying questions of law as to the existing power of taxation were not admitted or conceded by the demurrer, and remained for the consideration of the Court. The opinion of the Court is guarded by the following concluding words:

"In thus deciding, we are not to be understood as maintaining all that is averred in the defendants' return to the alternative writ.

"We do not assert that the relator is without remedy against the county, or that his remedy is restricted to a resort to the proceeds of the special tax. It is enough for this case that the judgment of the circuit court was correct on the pleadings."

III.

The special tax authorized by said clause was intended to provide for the payment of the PRINCIPAL *of the bonds by creating a* SINKING FUND *for their gradual extinction. It had no reference or application to current interest.*

This interpretation harmonizes with the decision of this court in United States *vs.* The County of Clark, 96 U. S., 211, *supra.*

It does not conflict with the points actually presented of record and decided by the supreme court of Missouri on this subject, because both of those cases involved not simply the interest but chiefly the *principal* debt itself.

State *ex rel.* Aull *vs.* Shortridge, 56 Mo., 126.

State *ex rel.* Watkins *vs.* Walker. (See pamphlet.)

In the language used, "*And may issue bonds therefor, and levy a tax to pay the same, not to exceed,*" the word "*same*" is employed as a pronoun referring directly and unambiguously to the preceding word "*bonds.*" Were the word "*bonds*" substituted for "*same,*" it is evident that the face of the bonds, or, in other words, the *principal* would have

been meant. From beginning to end, nothing is said as to the current interest upon the bonds. Neither its rate nor mode of payment is prescribed. Those points were left to the discretion and negotiation of contracting parties under the existing provisions of law.

The general statutes (*infra* IX), existing at the time this charter was granted, and now still in force, authorized any county subscribing railroad stock to issue the bonds of such county, of denomiaations not exceeding one thousand dollars, and bearing interest at a rate not "exceeding seven per cent. per annum" (section 33), and authorized such county "to provide a sinking fund to pay the principal," (section 34); and authorized a tax to be levied in one year even to the amount of thirty per centum of the subscription made (section 31).

The wise policy of Missouri legislation had long been to maintain the credit of its State and municipal securities.

In support of this policy every possible assurance was given to capitalists that the public securities would be paid. Nearly all the old railroad charters granted prior to the constitution of 1865, and sixty-six in number, empower the officials of the municipal corporations, authorized to subscribe stock, "to take proper steps to protect their interest and credit."

The power thus conferred had remained in the great majority of instances dormant and unused in 1865. Then, near the close of the war of the rebellion, the desire for promoting public improvements prompted the granting of this charter, with a new provision designed to give additional credit to the municipal bonds authorized by providing for the payment of the principal. The evils arising from over-issue of bonds, from the expansion of the currency and subsequent retraction, had not then been experienced.

It was presumable that the bonds would have to bear interest at some rate, payable at some place, and the same would

have to be provided for by the county in some way. But the legislature did not attempt to prescribe these details subordinate to the power then granted. But to give the bonds "*additional credit*," as heretofore decided, the legislature made provision for the gradual extinction of the principal indebtedness authorized to be created. Surely this is a more rational construction to be given this section than that now urged by the county, which would inevitably leave the principal debt *never to be paid.*

The reasonableness of this interpretation is fortified by the fact that such twentieth of one per cent. tax would prove an adequate provision to extinguish the principal of a moderate issue of bonds running twenty or thirty years.

If not apparently consistent with the letter of the statute it conforms to the spirit thereof. *Qui hæret in litteris hæret in cortice.*

This view of the thirteenth section has never been presented or passed upon; nor could it have been, upon the records of either of the three cases involving its construction hitherto before this Court.

IV.

The intention of the Missouri legislature in 1865, *when chartering a railroad corporation with* $4,000,000 *of capital stock to construct a great public improvement, and authorizing counties to aid in such construction, was that the bonds to be issued therefor should be of an amount to render* SUBSTANTIAL *aid, and should be of* NEGOTIABLE *character.* (See map of Missouri.)

The history of Missouri from its organization down to 1873 shows determination to have public improvements for the development of its natural resources.

The constitutional provisions regarding internal improvements up to 1865 are found in the constitution of 1825, adopted soon after the admission of the State, and are as follows:

"Article 7. Internal improvements shall forever be encouraged by the government of this State; and it shall be the duty of the general assembly as soon as may be, to make provision by law for ascertaining the most proper objects of improvement in relation both to roads and navigable waters; and it shall be their duty to provide by law for a systematic and economical application of the funds appropriated to those objects."

In 1846 a convention framed a constitution which, on submission to the people for ratification, was rejected. This instrument made no mention of internal improvements.

From an early day the general statutes conferred the power upon municipal corporations to aid in railroad construction within their borders. In 1865, at the close of the war, at a time of inflated currency and mania for speculation, is it supposable that the Legislature of Missouri intended in granting a new special charter, while sixty-five such were already in existence in the State, to limit the four great counties through which the projected road was to pass either in the amount of its bonds or in the amount to be paid thereon? With such a limitation of issue or payment of municipal bonds, relied on throughout the west by well-established custom to prepare the road-bed, the charter was worthless and would never have been accepted by the corporators.

To the railroad to run some forty miles diagonally through her borders Macon county, under defendant's present theory, should have restricted her aid to a mere trifle, which would have proved no substantial aid.

Both the above stated ends, viz., substantial aid and negotiability, *were attained* by the construction given said charter when the bonds were issued.

Both these ends *would have been frustrated* by adopting the construction now sought to be given.

Such was the construction given in 1870 and prior—

1. By the Supreme Court compelling the first issue to be made.

State *ex rel.* Missouri and Mississippi Railroad Company *v.* Macon County Court, 41 Mo., 453, (1867.)

2. By the defendant in making its two subscriptions and issues, and subsequently for years levying a tax of one-half of one per cent., adequate to pay the interest and part of the principal thereof.

3. By the railroad company which, receiving the bonds, issued $350,000 of its capital stock therefor to the defendant.

4. By the purchasers of the bonds.

What the railroad company realized from its sale of the bonds does not appear of record, nor is it in any wise relevant or material. Presumably they brought par. At all events the county realized par.

Cromwell *vs.* County of Sac, 96 U. S., 60.

Nor is it relevant or material how much if any of the railroad was ever built. The bonds were presumably subscribed and issued in anticipation of the construction, to aid therein.

State *v.* Bates County Court, 57 Mo., 70.
Kennicott *v.* Supervisors, 16 Wall, 452.
Town of Coloma *v.* Eaves, 92 U. S., 484.

Nor is it relevant or material whether a vote was ever taken for the issue of these bonds, nor what proportion of the people were favorable thereto or otherwise.

These being irrelevant and immaterial averments of the return are non-issuable, and hence unadmitted by the demurrer.

Commonwealth *v.* Com'rs Allegheny County, 32 Pa., 239.

In the face of the decisions and the judgment of the plaintiff, these facts are not entitled to the slightest consideration even as makeweight.

1. *Contemporanea expositio est optima et fortissima in lege.*
Broom's Legal Maxims, 456 (side p. 608.)
Dwarris on Statutes, 562.
State *v.* The Mayor, 49 Mo., 401, 404.

In Merchant's Bank *v.* Farmer, 43 Mo., 214, it is said:

"Under this law nine parent banks were established, with numerous branches, greatly exceeding the constitutional limit, if they are all to be held as independent organizations.

"It will be seen that the contemporaneous construction given to the amendment was that the branches merely formed a part of the parent banks. On no other theory could their existence for a moment be upheld. This construction has been acquiesced in, and their acts and privileges supported, when they clearly had neither validity nor existence on any other hypothesis.

"They were agencies, branches, or stems of the parent banks, and in this instance the parent bank must be held bound by the acts of its branch."

In State *vs.* Boone County Court, 50 Mo., 326, it is said:

"It is seven years since the constitution went into operation. During every session of the legislature it has construed, and, as I understand it, violated the provision under consideration. The people have acquiesced in the lawfulness of its action and conformed their public business to it; the courts have treated it as legal and obligatory, and thus a practical construction has been given to the clause which should have its weight, and, in a doubtful case, be decisive. I must, therefore, treat the clause as directory, binding upon the conscience of legislators, but, if disobeyed, the courts cannot furnish the remedy."

The supreme court of Missouri in an ejectment suit, Shipp *vs.* Klinger, 54 Mo., 238, in deciding that it was too late to question the constitutionality of an act of the legislature, passed prior to 1865, declaring a minor of age and legally competent to transact his own business said:

"It is now insisted that the act was unconstitional and void, and that it was not an exercise of legislative power, and that the deed made in pursuance of it passed no title.

"Whatever might be our opinion in regard to the policy or even validity of such acts under different circumstances,

we are constrained at the present day to hold them good. An examination of the session acts will show that from an early period in our State's history acts of this description were passed at almost every session, that their legality was never challenged, and that they were constantly acted upon.

"It would be entirely safe to say that millions of dollars have been invested upon the strength of these titles, and for the courts at this day to declare the acts and titles made in pursuance of them void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent."

"We must therefore decline to go into the question, or consider it open to discussion. The constitution of 1865 very wisely prohibited, in express terms, the special enactment of such laws, and the abuses which were practical under the former constitution in this respect cannot again occur. But passed titles which were made and received, when the acts giving them validity were universally acquiesced in, cannot now be disturbed."

In Chicago *v.* Sheldon, 9 Wall., 54, this Court says:

"What adds great weight to this view is it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d of May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling interest. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one.

"A contract having been entered into between the parties, valid at the time by the laws of the State, it is not competent even for its legislature to pass an act impairing

its obligations, much less could any decision of its courts have that effect."

In County of Scotland *v.* Thomas, 94 U. S., 693, it is said:

"But the case has other aspects which it is necessary to take into consideration. If we look at the subject in a a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls."

In County of Schuyler *v.* Thomas, Oct. T., 1878, (unreported,) it is said:

"These statutes are to be construed as they were intended to be understood when they were passed twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation. A construction may now be sought which will avoid the payment of the debts contracted for the building of the road, then it was to present every inducement to make subscriptions and to obtain the money. Little respect would have been paid to the careful legislator or the strict interpreter of the law, who, twenty years ago, had doubted the power of these counties to make the subscription in question."

2. *An instrument whose payment is contingent or uncertain is non-negotiable.*

1 Parsons on Notes and Bills, 42.

1 Daniels on Negotiable Instruments, 34.

Capital delights in certainty and is alarmed by doubts.

In Farquhar *vs.* Fidelity Insurance and Safe Deposit Company, U. S. circuit court, eastern district of Penna., Oct. 7, 1878, Chicago Legal News, Nov. 2, '78, per McKennan, J., it is said:

"It is essential to the peculiar nature of such an instrument that it should be 'simple, certain, unconditional, not subject to any contingency.' (Woods *vs.* North, 34 Leg. Int., 264; Story on Prom. Notes, 1.)

"There is no conflict of opinion as to the effect of such provision where the amount of the addition is determinable only by extrinsic evidence. An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive."

The bonds were under defendant's theory non-negotiable securities, manifestly unfit to answer the purpose of their creation. The door is thrown open to all equities which might be urged against them in the hands of the railroad company. Any failure by the company, for instance, to comply with its contract as to the location of the road, would be a good defense to the collection of the bonds, even in the hands of third parties. Indeed none of the safeguards, so carefully thrown around negotiable bonds, would avail to protect the purchaser of such as these. It follows that they could not be disposed of, for nobody outside of the lunatic asylum would buy them, because their validity, or what is the same thing, the power of the holder to collect them, would depend upon questions of fact, about which he could know nothing, and which might vary from year to year. Is it to be supposed the legislature intended to authorize the issue of worthless paper to aid in building up this enterprise? We cannot escape the conclusion, if we adopt the view of the Missouri courts. The

effect of this construction is that the county court may issue bonds so long as it can find people ignorant or confiding enough to take them. A monstrous idea to suppose the legislature of the State of Missouri intended to legalize such a confidence operation! If a limitation, section thirteen was undoubtedly intended as a check and guide to the county court in the matter of subscribing and issuing bonds, and they should have observed it when they made the subscription and issued bonds; but not having observed it then, they cannot take shelter behind it now.

V.

Defendant's theory of a special trust fund consisting of the twentieth of one per cent., on which alone all bondholders must depend for payment of interest and principal, is a newly discovered afterthought, subverting the intention of the contracting parties, denying justice to the creditors, and involving manifest absurdities.

Therefrom it follows—

1. That the supreme court of Missouri, by its peremptory mandate, compelled this defendant to issue $175,000 of bonds in 1867, when the said tax would have paid only one and a half per cent. interest per annum on said bonds, without any provision for ever paying the principal!

State *ex rel.* &c., *vs.* Macon County, 41 Mo., 453.

2. That defendant could legally issue its bonds *ad voluntatem*, *ad infinitum usque*, but could legally pay thereon only what said infinitesimal tax might yield!

3. That the bonds were of uncertain and contingent payment, and hence, irrespective of their amount, non-negotiable securities, and worthless for the public purposes for which they were issued!

4. That the legal liabilities of defendant on which general judgments are recoverable are destined never to be extin-

guished, but must demonstrably in time, by the accumulation and compounding of interest, far exceed in amount the whole taxable property!

5. That defendant, while paying less than one-tenth of the interest on its valid indebtedness, retains the $350,000 of railroad stock received in consideration thereof, and will devote all taxes derived from the property of said corporation to the education of the young!

1 Wagner's Statutes, 314 § 55.

6. That a *pro rata* share of such trust fund is all that any creditor desiring payment is entitled to, although there is no provision of law to secure to him even such participation therein!

7. That the litigation between the county and its creditors for the distribution of such special trust fund is destined to to be everlasting!

Defendant's theory renders these bonds an excellent exemplification of "*fiat money*"—

Or an excellent exemplification of "*coupon notes payable at will—the will of the maker.*"

Defendant's theory leaves the plaintiff in the condition so graphically depicted by the supreme court of Arkansas in State of Arkansas *vs.* Curran, 12 Ark., 366, "*in which all his rights live but in grace, and his remedies in entreaty, only.*"

VI.

"*In construing a statute reference must be had to the object to be attained and the means to be employed. It will not be presumed that the Legislature attempted to authorize a proceeding unreasonable in itself.*"

Neenan *vs.* Smith, 50 Mo., 523, 528.

"Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give a meaning from which any absurd consequences would follow, but must interpret in such a manner as to avoid absurdity."

"The reason of the law or of the treaty—that is to say, of the motive which led to the making of it and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning."—*Vattel.*

"An interpretation of a statute that leads to an unjust result should not be accepted."

"Good faith adheres to the intention; fraud insists on the letter when it thinks it can furnish a cloak for its prevarications."

"When a particular construction, and even the most obvious one, would lead to an unreasonable result, a different construction will be given if possible, without doing too much violence to the letter."

Sedgwick on Statutes and Const. Law, 235.

"There can be no sound interpretation without good faith and common sense."

Lieber's Rules of Construction, *Ibid*, 246.

"A construction of law that would impute to the Legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided, if it can be fairly and reasonably done."

Milner, Admr., *vs.* Pensacola, 2 Woods, 633.

In McCracken *vs.* City of San Francisco, 16 Cal., 591, plaintiff sought to recover money paid by him to the defendant, for lots illegally sold. *Inter alia*, the city objected that it could not become liable beyond $50,000, prescribed by its charter, viz.:

"The common council shall not create nor permit to accrue any debts or liabilities which, in the aggregate with all former debts or liabilities, shall exceed the sum of $50,000, over and above the annual revenue of the city, unless," &c., &c.

This section was the subject of a report, wherein the construction which it should receive was presented, and the Supreme Court, adopting it, says:

"The limit prescribed is entirely uncertain. Persons dealing with agents are bound by every limitation of their powers, but the limitation must be an existing one at the time of their dealing. and one within the knowledge of the persons so dealing. Assuming then all former liabilities to be known, there would be no existing limitation unless this sum and the additional debts or liabilities exceeded the annuul revenue by more than $50,000, a fact which not only could not be known, but would really continue entirely uncertain and contingent until the end of the year, when the productiveness of every source of revenue had been fully tested, and the revenues received.

"Under such circumstances all dealings with the city would be *mere gambling*, and the result would be that it would have *no dealings at all, or only at the most exorbitant and at ruinous rates.*

"But the amount of the debts and liabilities of the city, at a given time, is as uncertain as the amount of revenue to be received during the year. It would depend upon a settlement of its accounts with all its creditors, involving the adjustment of set-offs, counter claims, and unliquidated demands generally. The limititation, then, would be the difference between two quantities, both of which are unknown.

"And finally, whether this amount, whatever it be, would be found to exceed the annual revenue by more than $50,000, might depend upon the judgment and good faith with which the common council had exercised its powers of raising an annual revenue, and applied this revenue, with all other means it might have derived from accidental sources, to the discharge of its liabilities. The agents of the city may or may not have raised all the money by taxation and licenses, &c., which they had the power to raise, and ought to raise, and may or may not have applied its resources to the discharge of its debts and liabilities, and yet upon this fact may turn the question whether the person with whom they have dealt holds a valid demand against the city or not.

"Such a construction would put the creditor absolutely in the power of the debtor, and the legislature, in constituting a city government to act as the corporate agents of the city, cannot be supposed to have intended any such change in the fundamental principles of the law, even if we should admit, which we do not, that it possesses the power to have made it.

"For the reasons which we have given, gathered from the language of the section itself, from the general and controlling purpose of the charter taken as a whole and construed as any other public statute, and from well settled principles of law governing the relation of principal and agent, we have come to the conclusion that the charter of 1851 contained no limitation of the power of the common council to incur debts and liabilities as to the amount to be incurred, and that the fifth section of the third article is to be taken as directory."

The Court further says:

"Could the city defend against the claim for restitution upon the pretense that she was already indebted over $50,000? Could she, to use the language of counsel, *owe herself out of liability?*"

The amount indirectly involved "can have no weight in the determination of the case. It is our duty to pronounce the law, and with the consequences which follow we have nothing to do, whether they be to cast upon the city a liability of one dollar or of a million."

VII.

No notice in fact or in law was given to the purchaser of these bonds, adjudicated by both State and Federal courts to be valid legal obligations against the maker, that they were not to be paid with interest absolutely and unconditionally according to their terms.

They were made negotiable in form and payable in New York, with design to be circulated in the money markets of the world.

They appear to be couriers without luggage.

There is nothing on the face of the bonds to give warning that there was an over-issue—no hint on any bond that another like it exists. Purchasers might perhaps have discovered the facts by going to the county records; but, in the language of the Supreme Court of Missouri, when

speaking of a similar matter, "it would be altogether wrong to punish them for not doing so." State, &c., *vs.* Saline County Ct., 48 Mo., 395. The officers charged with the duty of issuing bonds are presumably competent and honest, and an innocent holder should not be called upon to ascertain how many obligations they may have put upon the market, so long as he makes sure that there is a law authorizing the issue of a bond such as he takes.

1. The amount of bonds or of interest that an annual tax of one-twentieth of one per cent. would pay was not capable of ascertainment at the time of the subscription or at any time thereafter.

The purchaser was not required by law to investigate *the ratio* existing between the debt so created and the tax assessments.

Such theory would impose upon the purchaser a burden which finds no sanction in the Federal decisions on this subject.

2. *Contra*, defendant had fullest knowledge and control of all these matters, and is presumed in favor of a *bona fide* purchaser of its securities to have acted through its duly elected and sworn officers within proper limits.

Omnia præsumuntur rite ac soleniter esse acta.

Broom's 2 Legal Maxims, 636, (side p. 847.)
State *ex rel.* Neal *v.* Saline County, 48 Mo., 390.
Pendleton County *v.* Amy, 13 Wall., 297.
Dillon on Municipal Corporations, § 419.
Town of Venice *v.* Murdock, 92 U. S., 494, 499.
Marcy *v.* Oswego Township, id., 637.
Humboldt Township *v.* Long, id., 642.
Ranger *v.* New Orleans, 2 Woods, 128.
Town of Coloma *v.* Eaves, 92 U. S., 484.

3. And if the purchaser in caution had made such investigation it could not afford him the slightest protection for the future.

The one-twentieth of one per cent. of the taxable propertywould, under this theory, represent the amount of bonds and interest that might properly be issued.

How much would be for the principal?

How much would be for interest?

How much allowance for delinquent and uncollected tax?

What if the aggregate assessment should decline in amount? It is at control of the county in some measure, and by relator's return it is shown that there was such decline of near $1,000,000 between 1867 and 1871, and of $840,000 between 1874 and 1875.

If the county subsequently issues more bonds, as by the decisions of the courts it had the power to do, on whom is the risk and loss to fall? Can it be that it must be borne by the purchasers of the securities instead of their maker?

Is the creditor absolutely in the power of the debtor?

I challenge my learned opponents to render answers consonant with common sense and common honesty.

In Commonwealth of Pennsylvania *ex relationi* Henry Whelen *vs.* The Select and Common Councils of the City of Pittsburg, supreme court of Pennsylvania decided, November 18, 1878, unreported, the relator was granted peremptory *mandamus* against the city at large for the payment of interest on the Pennsylvania Avenue bonds. See pamphlet.

Paxon, J., in the opinion of the court says:

"that the first ground of defence is that the bonds issued under the act of April 2, 1870, (Penn. Avenue Act,) and its supplements do not constitute part of the funded debt of the city of Pittsburgh; that the holders of such bonds are bound to look for the payment of the interest thereon, and to become due, to the assessments made under the provisions of said act upon the properties abutting upon the streets and avenues improved; and that no authority or power has been given or delegated to the councils of the city to levy a general tax, or any tax, to pay the interest on said bonds, or to apply any moneys out of the general resources of the city for that purpose.

"It was urged, however, that notwithstanding the fact that the bonds were issued by the city for their payment, yet that the holders must look for the payment of their interest to the street assessments upon the properties abutting upon the avenues. There is nothing in the case to indicate that such was the understanding or agreement of the parties at the time the bonds were sold. On the other hand there are persuasive reasons to show that it was not. These bonds were sold at par. The fourteenth section of the act of 2d of April, 1870, required that they should be sold at not less than par. That they could have been disposed of at par, or indeed for any considerable sum, had it been known that the holders were to look for payment to the municipal assessments upon abutting property is a proposition too absurd for discussion. It is not alleged that the city at any time, or at any place, gave notice to anybody that these bonds, though issued over her corporate seal, were payable out of street assessments. It is true each bond contained the statement that it was issued for the improvement of a certain avenue in pursuance of the before cited act of 2d of April, 1870. It is conceded that the bondholders are bound by the terms of that act, for the reason that is the authority upon which the bonds were issued. But I have looked in vain through the act for anything to show even a glimmering of legislative intent that the bondholder should look to the street assessments for his pay. Such a provision, if apparent upon the face of the act, must necessarily have rendered it wholly abortive. The whole plan depended upon the ability of the city to borrow the necessary amount of money. In construing this act, therefore, we are not to assume that the legislature intended to do that which would entirely defeat the object of the act itself. An examination of these sections, as well as the entire scope of the act, leads us irresistibly to the conclusion that the legislature did not intend that the bondholders should depend for the payment of their interest upon the street assessments. Had such been the intention of the legislature it would have been expressly so provided. Good faith to the bondholders required that they should have been told so in explicit terms.

"If the bonds in question are bonds of the city, then the duty of the city councils to include the interest as it accrues in the annual appropriation ordinance, and provide for its payment by a levy of sufficient taxes, is clear.

"We are all of opinion that the bonds in controversy are the bonds of the city of Pittsburgh, and a part of its debt; that they were issued by lawful authority and for a sufficient consideration, and that the honor, good faith, and the law of the land alike require that the city should provide for their payment.

"The judgment is reversed, and judgment is now entered for the relator upon the demurrer; and it is further ordered that a writ of peremptory mandamus issue to the select and common councils to forthwith make full and ample provision for the payment of all interest as it shall become due; and further commanding the said councils to assign and appropriate out of the revenue of said city, derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears, and to become due, giving preference, if any deficiency should arise, to the payment of said interest before the payment of salaries of city officers and the ordinary current expenses of the city."

But this Court itself has already in passing on this charter said:

"It is incredible that the legislature intended to deny to the purchasers of the bonds any right to look for payment beyond such meagre provision."

"We cannot think the legislature proposed rendering the bonds unsalable or almost worthless, in the hands of those who might be so unfortunate as to hold them."

"Nor can we think that the legislature intended to set a trap for purchasers and lead them to suppose they were obtaining valuable securities, when in fact they would obtain what was next to nothing."

United States *vs.* County of Clark, 96 U. S., 211.

This statute should be interpreted by "*an unbending principle of right, and a rigorous morality,*" to which the supreme court of Missouri in 1871 declared it had conformed its rulings upon this subject.

Steines *vs.* Franklin County, 48 Mo., 169, 179.

VIII.

The estoppel created in favor of the bona fide purchaser against the defendant, by the facts admitted of record, protects such purchaser not only in the recovery of a judgment, but also in its payment.

The alternative writ, following the information, stands undenied in its averments, viz., (Record, pp. 3, 5:)

"Said bonds were delivered to said railroad company in part payment of a subscription by said county for shares of the capital stock of said company, and said bonds were received by said company, and certificates of stock subscribed as aforesaid were issued to said county and were received by it, and said certificates and shares of stock are still held and owned by said county, and said county has ever since said subscription claimed and exercised the rights of a stockholder in said company, and said county levied and collected taxes at the rate of one-half of one per cent. to pay the interest of said bonds, and did pay the first four installments thereof, and to pay the interest of all the other bonds of like tenor and effect, and to pay the principal of other bonds issued by said county to said company under the same authority to a large amount, to wit, $18,000."

If ever it was part of the bondholder's contract that the county was not to pay more than one-twentieth of one per cent. taxes, the county has waived this right and become estopped:

1. By receiving and owning a full amount of stock, representing the bonds issued.

2. By exercising the rights of a holder of said stock.

3. By levying and collecting taxes adequate for the payment of the interest on the bonds issued, and paying the same.

4. By recognizing the issue of bonds by payment of part of the principal.

The reasoning of the courts in the long series of decisions relative to estoppel applies with full force, although no case precisely similar can be found.

Flagg *v.* Palmyra, 33 Mo., 440, (1863.)
Hannibal & St. Joseph R. R. Co. *v.* Marion County, 36 Mo., 294.
Barrett *v.* Schuyler County, 44 Mo., 197.
State *ex rel.* Neal *v.* Saline County, 48 Mo., 390.
Smith *v.* Clark County, 54 Mo., 58, (1873.)

Knox County *v.* Aspinwall, 21 How., 544.
Moran *v.* Miami County, 2 Black, 731.
Mercer County *v.* Hackett, 1 Wall., 83.
Supervisors *v.* Schenck, 5 Wall., 784.
Pendleton County *v.* Amy, 13 Wall., 297.
Lexington *v.* Butler, 14 Wall., 282.
Grand Chute *v.* Winegar, 15 Wall., 355.
Lynde *v.* The County of Winnebago, 16 Wall., 6.
Kennicott *v.* The Supervisors, id., 452.
St. Joseph Township *v.* Rogers, id., 644.
Town of Coloma *v.* Eaves, 92 U. S., 484.
Town of Venice *v.* Murdock, id., 494.
Converse *v.* Fort Scott, id., 503.
County of Moultrie *v.* Savings Bank, id., 631.
Marcy *v.* Town of Oswego, id., 637.
Humboldt Township *v.* Long, id., 642.
Leavenworth County *v.* Barnes, 94 U. S., 70.
Douglas County *v.* Bolles, id., 104.
Johnson County *v.* January, id., 202
Commissioners of Marion County *v.* Clark, id., 278.
Township of Burlington *v.* Beasley, id., 310.
County of Moultrie *v.* Rockingham Bank, id., 631.
Town of East Lincoln *v.* Davenport, id., 801.
County of Cass *v.* Shores, 95 U. S., 375.
Township of Rock Creek *v.* Strong, 96 U. S., 271.
San Antonio *v.* Mehaffy, id., 312.
County of Ray *v.* Vansycle, id., 675.

Shores *v.* Macon County, Oct. T. 1877, (unreported.)
City of Nauvoo *v.* Ritter, Oct. T. 1878, (unreported.)

IX.

Ample power to provide by taxation for the payment of interest upon the bonds authorized was conferred by the general statutes in existence at the time of the adoption of this special charter, February 20, 1865, *and now still in force.*

"To know what the common law [or existing general statute] was before the making of the statute is the very lock and key to set open the windows of the statute."—*Coke.*

"It is not to be presumed that the Legislature intended to make any innovation upon the common law [or existing general statutes] further than the case absolutely required."

Dwarris on Statutes, 185.

1 Revised Statutes of 1855, pp. 427, 429, 438.

"SEC. 30. It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this State; and the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held, to ascertain the sense of the taxpayers of such county or such city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation.

"SEC. 31. Upon the making of such subscription by any county court or city, as provided for in the previous section, such county or city shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this act, or by the charter of the company in which such subscription shall be made; and, in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court or city council making such subscription to issue their bonds *or levy a special tax upon all property and taxables made taxable by the law for State and county purposes, and upon the actual capital that all merchants and grocers may have invested*

in the county or city, to pay such installments, to be kept apart from other funds and appropriated to no other purposes than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year, in any county or city, shall not exceed THIRTY PER CENTUM of the subscription made by such county or city.

"SEC. 33. * * * Any county or city subscribing as aforesaid may (if so required by the railroad company to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax) issue the bonds of such city or county of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding seven per cent. per annum.

"SEC. 34. Any county court or city which has heretofore subscribed to the capital stock of any railroad in this State shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities by this act, and may *levy a special tax to pay the interest on their bonds, or to provide* A SINKING FUND *to pay the principal.*

"SEC. 57. All existing railroad corporations within this State, and such as *now or may be hereafter chartered*, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter contained in this act."

These provisions, in substance, were, subsequently to said charter, *re-enacted* in the general statutes which went into effect August 1, 1866, and they now still remain in force.

1 Wagner's Statutes, 305, 306, 312.

Ample power to tax is clearly included among the powers and privileges conferred by section 57, if it is not inconsistent with the charter.

Smith *vs.* Clark County, 54 Mo., 58.

Scotland County *vs.* Thomas, 94 U. S., 682.

The supreme court of Missouri has expressly held that, were it not for the supposed limitation in the charter, these statutes conferred ample power.

State *ex rel.* Aull *vs.* Shortridge, 56 Mo., 126, 130.
State *ex rel.* Watkins *vs.* Walker, (pamphlet, 35.)

Repeal by implication, when the prior and the latter act can consistently stand together, is never admitted.

City of Galena *vs.* Amy, 5 Wall., 705, 709.
McCool *vs.* Smith, 1 Black., 470.
City of St. Louis *vs.* Alexander, 23 Mo., 483.
State *ex rel.* M. and M. R. R. Co. *vs.* Macon County Court, 41 Mo., 453.
Osage Valley and S. K. R. R. Co. *vs.* Morgan County, 53 Mo., 158, (1873.)

Although it is true that the last three cases have been virtually overruled by the supreme court of Missouri, in its recent unreported utterances cited and relied on by the defendant—

State *ex rel.* Wilson *vs.* Garrontte Central Law Journal, July 12, 1878, p. 29.
State *ex rel.* Watkins *vs.* Walker, (pamphlet.)

—there is no inconsistency between the charter and the general statutes except that the general power to create a sinking fund given by the general statutes is limited by the charter to the one-twentieth of one per cent.

In Butz *vs.* Muscatine, 8 Wall., 575, 580, 581, it is said:

"In the construction of a statute, what is clearly implied is as effectual as what is expressed.

"The minutest details could not have made the meaning and effect of these provisions clearer than they are. The limitation in the act of 1852 is confined to the city of Muscatine. The regulations of the code are general in their terms, and apply to all the municipal corporations mentioned in section 3274, enacted in 1850.

"If these views be not correct, the position of the judgment creditor is a singular one. All the corporate property

of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus, nor the prospect of a surplus, which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay, the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if maintained, of the defendants in error.

"Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State to produce, by its action, such a condition of things in its jurisprudence."

Hence, the first and second certified questions should be answered in favor of plaintiff.

X.

Said section 13 *has no application to the plaintiff, who has recovered a general judgment against Macon County, and whose execution was returned nulla bona, although such judgment was based on coupons from bonds issued under the authority of said section.*

United States *vs.* County of Clark, 96 U. S., 211, 216.
Dissenting opinion of Judge Hough in State of Missouri *ex rel.* Watkins *vs.* Walker, (Pamphlet, 42.)

The defendant is concluded by the judgment at law.

Supervisors of Rock Island County *vs.* United States, 4 Wall., 435.
The Mayor *vs.* Lord, 9 id., 409, 413.

This position would have been untenable had the judgment been of a kind payable only out of the special half-mill tax.

Judgments are rendered against a county payable only by taxes upon a specified township.

Cass County *vs.* Johnson, 95 U. S., 360.

Jordan *vs.* Cass County, 3 Dillon, 185.

Judgments are rendered against executors payable *de bonis testatoris;* also against trustees payable from trust funds *quando acciderint.*

But this judgment was *general*, and correctly so, as conceded by the supreme court of Missouri, and as expressly decided by this court in Macon County *vs.* Shores, Oct. T., 1877.

The writ of *fieri facias* to enforce such judgment would be general. Then why should not the *mandamus* as well be general?

In State of Missouri *vs.* Ballinger County Court, 48 Mo., 478, a suit in *mandamus* for payment of warrants drawn on swamp lands fund, it was held:

"Were these general warrants for which the county was liable, we should first require that the claim they evidence be reduced to judgment. But they are drawn from a special fund, and the county cannot be sued in an ordinary action, and thus that remedy is unavailable."

Under this theory, these bonds were not payable out of a special fund, or a general judgment could not have been recovered thereon.

The right of plaintiff and that of defendant, as to going behind the judgment, is entirely different. On the trial, before the judgment was rendered generally, defendant had ample opportunity to show cause why the judgment should not be of a qualified and special character. The record shows such defense was in fact presented, considered, and overruled. Macon County *vs.* Shores, Oct. T, 1877. *Contra*, plaintiff, could not in the original action raise the question as to his ultimate remedies.

Hence, although plaintiff may complain if his remedies are impaired, it is not for defendant so to do after a general judgment has been rendered. The case of Von Hoffman *vs.*

Quincy, 4 Wall., 535, can be cited by the creditor, but it is not an authority to sustain defendants view, as cited.

Dillon, in his work on Municipal Corporations, § 686, says:

"When *judgment* is obtained, and there is no property subject to execution out of which it can be made, *mandamus* will lie, and is the proper remedy to compel the levy and collection of the necessary taxes to pay the judgment. When the claim is reduced to *judgment*, the duty to provide for its payment becomes perfect, and if it can be paid in no other way it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*."

Giving numerous citations.

In Commonwealth *vs.* Commissioners of Alleghany County, 37 Pa., 290, it is said:

"The authority to create the debt implies an obligation to pay it, and where no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way—by the levy and collection of taxes."

Reaffirmed in Commonwealth *vs.* Perkins, 43 Pa., 403:

Commonwealth *ex rel.* Whelen *v.* Pittsburgh, (*supra.*)

People *ex rel.* Frank *v.* City and County of San Francisco, 21 Cal., 668, 698.)

Iowa R. R. Land Company *v.* The County of Sac, 39 Iowa, 144.

State *ex rel.* Hasbrouck *v.* The City of Milwaukee, 15 Wis., 133, 142.

"It would be an anomaly in the judicial system of any government to invest its courts with jurisdiction to hear causes and render judgments, and yet deny them the power to execute and enforce their judgments."

United States *vs.* Jefferson County, in U. S. circuit court, eastern district of Arkansas, Central Law Journal, August 16, 1878, p. 130:

"Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy, in the suit before

the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree."

"Express determination of this Court is, that the juristion of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment or execution of a suit in a court of record."

"Process subsequent to judgment is as essential to jurisdiction, as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

Riggs *vs.* Johnson County, 6 Wall., 166, 187.

"It [mandamus] is a step toward the execution of the judgment and necessary to the jurisdiction of the court."

The Supervisors *vs.* Durant, 9 Wall., 417.

The case Supervisors of Carroll County *vs.* United States, 18 Wall., 71, cited and relied on by defendant, related to non-negotiable warrants, and followed the principles long settled by the supreme court of Iowa, without passing thereon.

Hence, the third certified question should be answered in the negative.

XI.

THE CASES—

State ex rel. Aull vs. Shortridge, 56 *Mo.*, 126.

State ex rel. Watkins vs. Walker, (*pamphlet*,)

are not conclusive authority to this Court, upon the questions now before it.

1. When a State statute has been construed by the supreme court of that State, prior to the contract based thereon, and that construction has been adhered to in a series of consistent subsequent decisions, such construction will be adopted by this Court.

Supervisors of Carroll County *vs.* United States, 18 Wall., 71, 81–2.
Township of Elmwood *vs.* Marcy, 92 U. S., 289.
Town of South Ottawa *vs.* Perkins, 94 U. S., 260.

This principle, although conceded to be well settled, has no application to the case at bar.

2. When a State statute has been construed by the supreme court of that State prior to the contract based thereon, and that construction has subsequent to the contract been abandoned in its decisions, the prior construction will be adopted by this court.

The Ohio Life and Trust Company *vs.* Debolt, 16 How., 416, 432.
Gelpcke *vs.* Dubuque, 1 Wall., 175.
Meyer *vs.* City of Muscatine, id., 384.
Havemeyer *vs.* Iowa City, 3 Wall., 294, 303.
Thompson *vs.* Lee County, id., 327.
Rogers *vs.* Burlington, id., 654, 664.
Mitchell *vs.* Burlington, 4 Wall., 270.
Larned *vs.* Burlington, id., 275.
Supervisors *vs.* Schenck, 5 Wall., 772.
Lee County *vs.* Rogers, 7 Wall., 181.
The City *vs.* Lamson, 9 Wall., 477.

This principle applies to the case at bar. The supreme court of Missouri in 1867, in compelling the issue of the bonds, decided *by necessary implication* that their interest and principle were to be paid; but now it holds that the purchaser is entitled to but his *pro rata* share of the limited tax.

This court is not now required to follow "such oscillation" to "immolate truth, justice, and the law," because the supreme court of Missouri "has erected the altar and decreed the sacrifice."

3. When a State statute has not been construed by the supreme court of that State until after a contract based thereon has been made, and then construed by said court adversely to the right of the holders of commercial securities, this court will form its own judgment and construction.

Swift *vs.* Tyson, 16 Pet., 1.
Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.
Mercer County *vs.* Hackett, 1 Wall., 82, 96.
Butz *vs.* Muscatine, 8 Wall., 575, 585.
Olcott *vs.* Supervisors, 16 Wall., 678, 688.
Pine Grove Township *vs.* Talcott, 19 Wall., 666, 678.
Town of Venice *vs.* Murdock, 92 U. S., 494.

This principle applies unquestionably with full force to the case at bar. Commercial securities are involved. When the bonds were issued there had been no intimation from any quarter that the purchaser would be confined for payment to his share of an uncertain fund.

Even if, as contended by defendant, the supreme court of Missouri never passed on the clause of limitation until after the bonds were issued and negotiated, this court is not bound "to yield to the authority of the courts of Missouri and abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an indepedent Federal judiciary, and thereby render the exercise of its appellate jurisdiction but a solemn mockery."

4. The case State *ex rel.* Aull *vs.* Shortridge has received the consideration and construction of this Court in the case United States *vs.* The County of Clark, 96 U. S., 211.

The view that the one-twentieth of one per cent. was intended as a sinking fund to provide for the principal was not advanced by the relator. On the contrary, by his brief and argument he conceded that that clause of the charter was a limitation on the amount of bonds authorized to be issued.

5. The case of State *ex rel.* Watkins *vs.* Walker was a collusive suit, designed to overthrow the decision of this Court in United States *vs.* The County of Clark, 96 U. S., 211, and confessedly to affect suits pending in the United States circuit court for the western district of Missouri, and to forestall the decisions of this court in cases at bar.

This is patent from the records, (see pamphlet.)

January 7, 1878, the Clark county case was decided.

January 25, 1878, information filed for mandamus in the Macon county circuit court ..... page 1

Same day, alternative writ issued 3

Same day, returns made by respondents 5

Same day, demurrer to returns by relator 11

Same day, case submitted to circuit court 12

Next day, judgment rendered for respondents 12

April 10, 1878, respondents granted relator a warrant for the amount of his judgment 44

April 29, 1878, transcript filed in State supreme court 14

Same day, submission by agreement under 21st rule 14

Same day, relator's brief filed, consisting of two pages, and citing only the Clark county case 15

May 13, 1878, respondents move to have case advanced, which was granted, on the express grounds of pending litigation in the Federal courts against them in two cases, one of which is case No. 858 *in this Court* 18

Oct. 30, 1878, decision of supreme court rendered. Napton, J., not sitting, and Hough, J., in part dissenting 23

Heu pudor et decus!

XII.

The relative rights of the bondholders as among themselves cannot be adjudicated in this proceeding.

This is a proceeding not in equity *but in law*. No other creditors or bondholders, having judgment or not having, having bonds or merely coupons, having bonds of the first

or supreme court issue, or of the second or county court issue, are now before this Court. Upon this record their respective rights cannot be directly affected, much less settled, as now sought by the defendant.

It is not alleged that plaintiff had actual notice of the existence of two issues of bonds. The bonds themselves convey no such intelligence. Their designating numbers have no more significance than numbers on insurance policies or on baggage checks. They are only for the convenience of the maker.

Nothing in the nature of a lien attaches to the bonds, and there is no priority among the holders. It is not practicable for defendant to go behind the judgment rendered.

Havemeyer *v.* Iowa County, 3 Wall., 294, 303.
Daniels *v.* Railroad Company, id., 250.
City of Galena *v.* Amy, 5 Wall., 705, 709.

Hence the fourth and fifth certified questions require no determination or answer by this Court.

The difficulty is already experienced by the defendant and the United States circuit court of distributing "the special trust fund" among the creditors—in other words, of annually marshalling the trust assets among securities negotiable and commercial at least in form.

Defendant, in urging the speedy decision of the case of State *ex rel.* Watkins *vs.* Walker, quoted the maxim: *Interterest reipublicæ ut sit finis litium.* But its theory, adopted by said court, will necessarily lead to unending litigation among the creditors in the distribution of the "trust fund." They alone will be free who consent to ask nothing.

The amounts receivable are wholly incapable of ascertainment in advance, and to learn the present value of such a bond, even approximately, if more than zero, requires the services of a master in chancery or of an actuary expert in logarithms.

This difficulty impels the defendant to ask this Court to establish for its future guidance the rules of distribution.

This difficulty demonstrates to the plaintiff that "the special trust fund" theory is an absurd after-thought.

In conclusion, I beg leave to quote the language of Judge Woodward in the opinion of the Supreme Court of Pennsylvania in Commonwealth *v.* Commissioners of Allegheny County, 27 Pa., 228–9:

"Under these circumstances the question arises, Is Alleghany county bound to provide for her interest? We unhesitatingly answer—YES, SHE IS.

"The bonds were marketable articles; they were made for the markets of such securities, and the county having permitted the company to put them into the market, and still allowing them, even to the present moment, to stand before the world as genuine pledges of the faith of the county unquestioned and as if unquestionable, it is the plainest of all dictates, whether of morals or of law, that she should provide for the accrued and accruing interest. To this extent her obligation is a present one, and imperative. She cannot neglect, postpone, or repudiate it without a stain on her good name more dark than the smoke of her industry.

"It was a public loan on the faith of the public credit. Such loans are common, not only on the part of our general and State governments, but among all organized States of the civilized world, and there is no sentiment on which mankind are more united than on the inviolability of such public pledges.

"And the sentiment is very sound, for repudiation of public obligations is sure to be followed by social disorders and general decay of private morals. In the revolution of governments, whatever dynasty goes up or down, the public debt remains, and is always recognized by the existing government. The strongest state of Europe is not strong enough to repudiate her debt; the weakest and most contemptible is not base enough."

Respectfully submitted,

JOSEPH SHIPPEN,
Attorney for Plaintiff.

TRANSCRIPT OF RECORD

—IN THE—

SUPREME COURT OF MISSOURI

THE STATE OF MISSOURI IN THE RELATION AND TO THE USE OF WILLIAM W. WATKINS, *Plaintiff,*

against

JOHN P. WALKER, GEORGE L. TOWNER and LEE LINGO, Justices of the County Court of Macon County, Missouri,

Defendants.

MANDAMUS.

APPEAL FROM THE MACON COUNTY CIRCUIT COURT, JANUARY TERM, A. D. 1878.

FILED, APRIL 29, 1878.

DECIDED, OCTOBER —, 1878.

CERTIFIED COPY

OF THE ORDER OF THE COUNTY COURT OF MACON COUNTY, GRANTING RELATOR A WARRANT, APRIL 10, 1878.

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MACON COUNTY CIRCUIT COURT, JANUARY TERM, A. D. 1878.

THE STATE OF MISSOURI IN THE RELATION AND TO THE USE OF WILLIAM W. WATKINS, *Plaintiff*,

against

JOHN P. WALKER, GEORGE L. TOWNER and LEE LINGO, Justices of the County Court of Macon County, Missouri, *Defendants.*

MANDAMUS.

Be it remembered that on January 25, 1878, the Plaintiff in the above cause filed his petition and application for Mandamus in words and figures following:

THE STATE OF MISSOURI, on the relation of William W. Watkins, *Plaintiff*, *vs.* John P. Walker, George L. Towner and Lee Lingo, Justices of the County Court of Macon Co., Mo., *Defendants.* } In the Circuit Court of Macon County.

PETITION FOR WRIT OF MANDAMUS.

Now comes William W. Watkins, the relator herein, and gives this Court to be informed that on the 31st day of May, 1877, at the May term of the Circuit Court of Macon county, A. D. 1877, this relator, by the consideration of said Court, recovered a judgment against said

Macon county for the sum of three thousand six hundred and forty-five dollars, in the aggregate on the bonds of said Macon county and interest due thereon, on the 1st day of November, 1867, by the County Court of said county, issued aud delivered to the Missouri and Mississippi Railroad Company, a railroad company duly chartered by the laws of the State of Missouri; which said bonds were so issued and delivered by virtue of the power vested in said County Court of said county by the provisions of the charter of said railroad company, and which said bonds were so issued for subscription by said county to the stock of said railroad company, and were numbered respectively 101, 102, 103, 104, 105, 106, which said judgment bears six per cent. interest per annum from the date of the rendition thereof; that said judgment is now subsisting against said county and wholly unpaid; that said Macon county has no property liable to an execution by which said judgment or any part thereof might be made; that this relator has made a demand on said County Court, and the said Judges thereof, defendants herein, to draw and deliver to this relator the proper warrant of said county, to the Treasurer of said county on the common fund of said county, for the payment of said judgment, interest and costs, which demand said County Justices, defendants herein, refused, and still refuse to comply with; that the levy of one-twentieth of one per cent. on the assessed value of the taxable property of said county authorized by the charter of said railroad company, is entirely inadequate and insufficient to pay said judgment and other judgments now subsisting against said county, on other bonds of said county issued by the County Court of said county to said railroad company, by virtue of the authority and for the purposes aforesaid, so that there are no funds in the hands of the Treasurer of said county, raised by a levy of one-twentieth of one per cent. on the taxable property of said county to pay said judgment; that the relator is without any other adequate remedy at

law to make or realize the amount of his said judgment, and therefore prays the Court for a writ of mandamus from this Court, to be directed to the defendants, County Justices of said county, commanding them as such justices to draw and deliver to this relator the warrant of said county in due form, to the Treasurer of said county on the common fund of said county for the amount of said judgment, and interest and costs therein and other proper and necessary relief.

JAMES L. BERRY, and
SAMUEL J. WILSON,
Attorneys for Relator.

STATE OF MISSOURI, } *ss.*
County of Macon, }

I, Samuel J. Wilson, being first duly sworn, depose and say that I am one of the attorneys for the relator in the above entitled cause; that I know the facts, set forth in the foregoing petition, and that the same are true, as I verily believe. SAMUEL J. WILSON.

Sworn and subscribed to before me this 24th day of January, 1878.

THOS. A. SMEDLEY, *Clerk.*

That afterwards and on January 25th, 1878, there was issued by this Court an alternative writ of mandamus to the justices of said county court in words and figures as follows:

THE STATE OF MISSOURI, on the relation of William W. Watkins, *Plaintiff*, *vs.* John P. Walker, George L. Towner and Lee Lingo, Justices of the County Court of Macon Co., Mo., *Defendants.*	Circuit Court of Macon County, January Term, 1878. Writ of Mandamus.

The State of Missouri, to John P. Walker, Geo. L. Towner and Lee Lingo, Justices of the County Court of Macon County, GREETING:

Whereas, it has been represented to our circuit court

of Macon county, Missouri, that on the 31st day of May, A. D. 1877, at the May term, A. D. 1877, of the circuit court of Macon county, the relator, by the consideration of said court, recovered a judgment against Macon county for the sum of three thousand six hundred and forty-five dollars in the aggregate, on the bonds of said Macon county and interest due thereon, on the 1st day of November, 1867, by the county court of said county issued and delivered to the Missouri and Mississippi Railroad Company, duly chartered by the laws of the State of Missouri, which said bonds were so issued and delivered by virtue of the power vested in said county court of said county, by the provisions of the charter of said railroad company and which said bonds were so issued for subscription by said county to the stock of said railroad company, and were numbered respectively 101, 102, 103, 104, 105 and 106, which said judgment bears six per cent. interest per annum from the date of the rendition thereof; that said judgment is now subsisting against said county and wholly unpaid; that said Macon county has no property liable to an execution by which said judgment or any part thereof may be made; that said relator has made a demand on said county court, and the said justices thereof, defendants herein, to draw and deliver to this relator the proper warrant of said county to the treasurer of said county, for the payment of said judgment, interest and costs, which demand said county justices, defendants herein refused and still refuse to comply with; that the levy of one-twentieth of one per cent. on the assessed value of the taxable property of said county, authorized by the charter of said railroad company, is entirely inadequate and insufficient to pay said judgment and other judgments now subsisting against said county, on other bonds of said county, issued by the county court of said county to said railroad company, by virtue of the authority and for the purposes aforesaid, so that there are no funds in the hands of the treasurer of said county,

raised by a levy of one-twentieth of one per cent. on the taxable property of said county, to pay said judgment; that the relator is without any other adequate remedy at law to make and realize the amount of his said judgment, and, therefore, being willing that full and speedy justice be done in the premises, do command you, the said John P. Walker, George L. Towner and Lee Lingo, justices of the county court of Macon county, to draw and deliver to the relator, the warrant of said county, for the amount of said judgment and interest and costs, or make return to this writ forthwith and show cause why you do not do so.

ANDREW ELLISON, *Judge.*

January 25, 1878.

That afterwards, and on January 25, 1878, the defendants made their return to said alternative writ of mandamus and filed the same in the office of the clerk of this court, which return is in words and figures following, viz:

THE STATE OF MISSOURI *ex rel*, William W. Watkins, *Plaintiff*,

against

John P. Walker, George L. Towner and Lee Lingo, Justices of the County Court of Macon county, Missouri, respondents in the Circuit Court of Macon county, January term, 1878.

Now, at this day comes the respondents, and for a return to the alternative writ of mandamus issued in the above cause, or so much thereof as they are advised that it is material for them to answer, admit that on the 31st day of May, 1877, at the May term of the Circuit Court of Macon county, in the State of Missouri, A. D. 1877, the relator, William W. Watkins, by the consideration of said court, recovered a judgment against the county of Macon for the sum of three thousand six hundred and forty-five dollars, in the aggregate, which judgment was on the bonds of said Macon county and

the interest due thereon, which bonds were issued on the 1st day of November, 1867, by the county court of Macon county, and were issued and delivered to the Missouri and Mississippi Railroad Company, a railroad company duly chartered by the laws of the state of Missouri, as hereinafter stated, and that said bonds were so issued and delivered under and by virtue of the power vested in said County Court of said county, by the provisions of the charter of said railroad company aforesaid, and that said bonds were so issued and delivered for a subscription by said county to the capital stock of said railroad company and in payment thereof, and that said bonds were numbered respectively 101, 102, 103, 104, 105 and 106, and were due at five years after the date of their issue; that said judgment bears six per cent. interest thereon from its rendition. Respondents admit that said judgment is now subsisting against said county and is wholly unpaid. Respondents admit that county of Macon is not the owner of any goods, chattels, moneys, lands or other property subject to levy and sale under execution to make said judgment or any part thereof. Respondents admit that the relator has made a demand on said county court of Macon county and the justices thereof (these respondents) to draw and deliver to relator the proper warrant of said county, upon the treasurer thereof, and to him directed, on the common fund of said county for the payment of said judgment, interest and costs, and they admit that they refused to order or issue said warrant, and still refuse so to do. Respondents admit that a levy of one-twentieth of one per cent. on the assessed valuation of all the property in said county, taxable by law as authorized by the charter of said railroad company, is inadequate and insufficient to pay said judgment and other judgments now subsisting and unpaid against said county of Macon on the bonds of said county,issued by the county court thereof to said railroad company, by virtue of the authority of said charter and for the purpose aforesaid.

These respondents admit that there are no funds in the hands of the treasurer of said county raised by a levy of one-twentieth of one per cent. on the taxable property of said county to pay said judgment.

For a further return of said writ of mandamus, respondents admit that under and by virtue of an Act of the General Assembly of the state of Missouri entitled "An Act to incorporate the Missouri and Mississippi Railroad Company," approved February 28, 1865, the corporators therein named, organized and accepted the provisions of said act on the —— day of September, 1866, and from that day said corporators became and have been a body corporate and politic under the name of the "Missouri and Mississippi Railroad Company." That the 13th section of said "Act" conferring said power to subscribe as aforesaid. Said act reads as follows:

"SEC. 13. It shall be lawful for the corporate authorities of any city or town, or county court of any county, desiring so to do to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

That in and by the authority conferred upon the county court of Macon county in the said sections and no other power or authority, said court, on the 2d day of April, A. D., 1867, subscribed the sum of one hundred and seventy-five thousand dollars to the capital stock of said railroal company,and issued bonds to it in payment of said subscription (a portion of which are involved in this suit); that said subscription was made without the assent of two-thirds of the qualified voters of Macon county, no election regular or special having been had in said county for the purpose of obtaining such assent, but, on the contrary, said subscription was made by said county court against the wishes of a very large majority of the qualified voters of said county.

Respondents further aver, that afterwards, to-wit: On the 12th day of April, 1870, said county court made a second subscription of one hundred and seventy-five thousand dollars to the capital stock of said railroad company, and issued bonds in payment thereof; that said second subscription was made without the assent of two-thirds of the qualified voters of said county, no election regular or special having been held in said county for the purpose of obtaining said assent, but on the contrary said subscription was made by said county court against the wishes of nine-tenths of the qualified voters of said county; that the money realized from both of said subscriptions and the bonds issued therefor have all been spent, and no portion of the Missouri and Mississippi railroad has been completed except seventeen miles between Salisbury, in Chariton county, and Glasgow, in Howard county; that the bonds upon which relator's judgment was obtained were a part of the bonds issued in payment of said first subscription as aforesaid; that ever since the issuing of said bonds in payment of said first subscription, said county court of Macon county, under and by virtue of said "Act" of the general assembly, has levied every year a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and authorized said special tax to be extended upon the tax books of said county for each year, and had said special tax collected for the purpose of paying said bonds and interest so far as the same would do so: the tax thus collected being inadequate to pay all the interest on said bonds; that the aggregate valuation of the taxable property in Macon county for the year 1877 was four million eight hundred and fifty-three thousand five hundred and eighty-four dollars and forty-seven cents, that the valuation of the taxable property in said county in the year 1878 will be about the same amount.

That the 11th section of the X article of the constitution of the State of Missouri limits the power of county courts in levying taxes for county purposes as follows:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

That by section 165 of chapter 118 of Wagner's Missouri statutes, it is provided as follows: "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes. But the county tax shall in no case exceed one-half of one per cent. on all taxable property." That these respondents have no authority to levy any other or greater tax for common fund purposes than 50 cents on the $100 valuation of the property in the county in any one year; that such levy of 50 cents on the $100 valuation constitutes the "common fund" of the county, upon which relator seeks to have a warrant drawn to pay his judgment against said county; that by the laws of the State of Missouri, the respondents as justices of the Macon County Court are required to pay out of said common fund the salaries and fees of all county officers for performing their respective duties imposed upon them by the laws of the state; for the support of the poor of the county; for the support of county patients in the various asylums of the state; for building and repairing bridges; opening public highways; the payment of grand and petit jurors in the county; expenses of witnesses before the grand jury, and serving subpœnas for their attendance thereon; for books and stationery for the county and offices, and many other expenses too tedious to mention. That the payment of said salaries and expenses absorbs all the said tax of 50 cents on the $100 valuation when prudently and economically applied, so that there is nothing left in the county treasury with which to pay a warrant if drawn in favor of relator on the county treasurer for the amount of his judgment, interest and costs.

That if these respondents should draw such warrant it would take money which, legitimately and properly, is only applicable to the purposes herein before stated, and it would suspend and disorganize the county government.

That these respondents as justices of the Macon County Court have no legal power or authority to levy any other or greater taxes than is herein before stated.

The relator under the laws of the state is not entitled to any portion of the common fund of said county until all the fees and expenses necessary to the running and operating of the county government have been first paid; that said fees and expenses absorb all the money arising from said tax of 50 cents on the $100 valuation of property in said county annually; that the relator is only entitled to his *pro rata* of said special tax of 1-20 of one per cent., so levied and collected upon the taxable property in the county in each year with all other creditors of said county who have judgments as aforesaid and coupons thereon, and the interest on other bonds as aforesaid still outstanding, issued to said railroad company as herein before stated, and is not entitled to a warrant on the common fund, or any other fund of said county, except that created by said special levy of 1-20 of one per cent.; that there are judgments which have been rendered upon bonds and coupons issued as aforesaid against said county aggregating from fifty to sixty thousand dollars in favor of various individuals rendered in the United States Circuit Court for the Western District of Missouri, and the Circuit Court of Macon County, which remain unpaid and unsatisfied, and said county has no property or money out of which to pay the same.

Wherefore these defendants say that the relator is not entitled to have a warrant on the common fund of Macon County upon the treasurer of said county for the amount of his judgment, interest and costs or any part thereof, and they pray that the county government may be by it fully protected against the claim of the relator

for a warrant as prayed, and that they be discharged with their proper costs. J. W. ROBERTS,

Prosecuting Attorney for Macon County.

James Carr and B. G. Barrow of Counsel.

John P. Walker, Geo. L. Towner and Lee Lingo, justices and defendants, make oath and say that they understand the foregoing return and facts therein stated and they verily believe that they are true. J. P. WALKER,
G. L. TOWNER,
LEE LINGO,

Subscribed and sworn to before me January 25, 1878.

[L. S.] James M. Love, *County Clerk.*

On said returns are indorsed the following words and figures, viz:

"State of Missouri, *ex rel*,
Wm. W. Watkins,

vs.

J. P. Walker, G. L. Towner, Lee Lingo, county justices of Macon county, return to mandamus.

Filed January 25, 1878. T. A. SMEDLEY, *Clerk.*"

That afterwards, and on January 25, 1878, the plaintiff filed a demurrer to said return, which demurrer is in words and figures as follows, viz:

The State of Missouri, on the relation of William W. Watkins, *plaintiff*, *vs.*

John P. Walker, Geo. L. Towner and Lee Lingo, justices of the county court of Macon county, *defendants.*

In the Circuit Court of Macon county.

DEMURRER.

Now comes the plaintiff, relator herein by his attorneys, and demurs to the return of the defendants to the alternative writ of mandamus, herein, for the reason that said return is in all respects insufficient and shows no cause why the peremptory writ should not go.

S. J. WILSON,
J. L. BERRY, } *Attorneys for Relator.*

On said demurrer are indorsed the following words and figures:

"State to relation of W. W. Watkins,
vs.
Jno. P. Walker *et al.*
Demurrer to return to alternative writ of mandamus.
Filed January 25, 1878.
THOS. A. SMEDLEY, *Clerk.*"

Whereupon said demurrer to said return was taken up and argued by the counsel for the relator, and also by the counsel for the respondents, and the court not being fully advised in the premises took the same under advisement. And afterwards, to-wit, at the January term, A. D. 1878, of said court, and on the 26th day of January, 1878, there is the following entry of the action of the court on said demurrer, which was the action of the court thereon:

The State of Missouri, *ex rel*, William W. Watkins,
Plaintiff,
vs.
John P. Walker, George L. Towner and Lee Lingo, Justices of Macon County Court,
Respondents.

The court having considered the demurrer to the return of the respondent, to the alternative writ of mandamus, issued herein, and being fully advised in the premises.

It is considered and ordered by the court that said demurrer be overruled, to which ruling on said demurrer the plaintiff at the time excepted and the relator declining further to plead, whereupon it is further considered by the court that the relator is not entitled to have a warrant drawn in his favor on the treasurer of Macon county for the sum of thirty-six hundred and forty-five dollars and interest and costs, or any part of either, on the common fund of Macon county to satisfy the judgment interest and costs described in said alternative writ

of mandamus, and it is further ordered by the court that a peremptory writ of madamus as prayed for herein be denied, that the respondents go hence without day and that the relator take nothing by his writ herein and that the defendants recover of relator their costs herein laid out and expended, and that they have their writ of execution therefor; whereupon said relator makes application for and prays an appeal to the supreme court of the state of Missouri: And afterwards, to-wit, on January 29, 1878, S. J. Wilson, as atterney and agent for the relator, makes and files in court an affidavit for appeal to the supreme court of the state of Missouri, and the relator prays and asks for such appeal, which affidavit is in words and figures as follows:

THE STATE OF MISSOURI, *ex rel.* William W. Watkins, *Plaintiff*,

against

John P. Walker, George L. Towner and Lee Lingo, Justices of the Macon County Court, *Defendants*, in the Macon County Circuit Court, January term, 1878.

This affiant, S. J. Wilson, states that he is the attorney and agent for William W. Watkins, the plaintiff in the above entitled cause, and that the application for an appeal by said plaintiff in said cause is not made for vexation or delay, but because this affiant believes that the appellant is aggrieved by the judgment or decision of this Court. S. J. WILSON,

Agent and Attorney for William W. Watkins.

Subscribed and sworn to before me, this 29th day of January, A. D. 1878.

THOMAS A. SMEDLEY, *Clerk.*

MACON CIRCUIT COURT,
JANUARY TERM, 1878, January 29, 1878.

The following proceedings were had:

THE STATE OF MISSOURI in the relation and to the use of

William W. Watkins, *Plaintiff*,

against

John P. Walker, George L. Towner and Lee Lingo, Justices of the County Court of Macon County, Missouri, *Defendants*.

Now comes the plaintiff and files his affidavit, praying the Court to grant an appeal in this cause to the Supreme Court of this State, which said appeal is granted by the Court.

STATE OF MISSOURI, } *ss.*
COUNTY OF MACON. }

I, Thomas A. Smedley, Clerk of the Macon County Circuit Court, certify that the foregoing pages from one to twelve contain a full, true and complete transcript of all the record and proceedings had in the cause therein named as fully as the same remains of record and on file in my office.

In testimony whereof, I have hereto set my hand and affixed the seal of said Court at my office in the City of Macon, County and State aforesaid, this 24th day of April, A. D. 1878.

[SEAL.] THOMAS A. SMEDLEY, *Clerk*.

On the back of said transcript appears the following endorsement, to-wit:

THE STATE OF MISSOURI, *ex rel.* William W. Watkins, *Plaintiff*,

against

John P. Walker *et al.*, Justices of the County Court.

Appeal from Macon County.
Filed April 29, 1878.

HENRY W. EWING, *Clerk*.

Submitted under the 21st Rule.
Berry & Wilson, Plaintiff.
Carr & Barrow and J. W. Roberts for Defendant.
Docket fee paid.

THE STATE OF MISSOURI at the relation and to the use of William W. Watkins, *Appellant*,

against

John P. Walker, George L. Towner and Lee Lingo, Justices of the County Court of Macon County, *Respondents*.

IN THE SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF APPELLANT.

The relator, at the May term, 1877, of the circuit court of Macon county, recovered judgment in said court, against Macon county, for an aggregate amount of three thousand six hundred and forty-five dollars, on the bonds of said county, issued for subscription to the capital stock of the Missouri and Mississippi Railroad Company.

On the 25th day of January, 1878, the relator filed his petition in the circuit court of said county, against the respondents, as justices of the county court of said county, for a mandamus to compel them to order and direct the clerk of said county court to issue and deliver to relator a warrant on the county treasurer of said county, on the common fund, for the payment of said judgment and costs, out of the treasury of said county.

On the said 25th day of January, 1878, and at the January term, 1878, of said circuit court, an alternative writ of mandamus was issued against respondents, to which they made return on the same day.

The relator filed his demurrer to said return, as showing no sufficient cause why the peremptory writ of mandamus should not go against respondents; and upon the hearing of said demurrer, at said term, the same was overruled by the court, to which action of the court, the relator at the time excepted, and refused to further plead

to said return; and the court thereupon dismissed the relator's petition, and gave judgment accordingly, and the case is brought to this court by appeal.

I.

The circuit court should have sustained the demurrer, and awarded the peremptory writ of mandamus.

The United States, *ex rel.* Wm. A. Johnson, plaintiff in error, *vs.* the County Court of Clark County, and the justices thereof, decided at the October term, 1877, of the Supreme Court of the United States, No. 600.

II.

The judgment is a general liability against the county, and payable out of the common fund of said county, and it was the duty of the county court to direct its clerk to issue a warrant on the county treasurer for its payment.

Chapter 40, article 4, section 28, of Wagner's Statutes, page 414; section 31, page 415.

By virtue of the provisions of the act of the general assembly of Missouri, chartering the Missouri and Mississippi Railroad Company, Macon county subscribed to the capital stock of said railroad company, to a large amount, and is, to-day, the owner and holder of such stock, and in consideration, therefor, issued and delivered her bonds, stipulating therein, absolutely and unconditionally to pay her subscription, dollar for dollar, at the maturity of said bonds, and it matters not whether the stock is worth par or worthless, the liability of the county to pay the bonds is fixed and absolute.

The tax of one-twentieth of one per cent., provided for in the act chartering said railroad company, was intended to give additional credit and commercial value to county bonds issued for subscription to the stock of said railroad company. The subscription was authorized to

aid in the construction of a railroad, and it was certainly not intended by the act, that the value of the bonds was to be impaired by the provision of a limited special tax to pay them, entirely inadequate, thereby defeating the very object for which the subscription was authorized.

No question can be made in this case, as to the power of the county court to take the stock; nor as to the legality in any shape, of the bonds issued therefor. The respondents are concluded by relator's judgment, which judgment is to all intents and purposes a general and unqualified liability against the county, and payable as any other ordinary debt, out of the general fund of the county, raised for such purposes; and the return of respondents, while not having the virtue of brevity, shows no earthly reason or excuse why the respondents should not order and direct the county clerk of Macon county to issue the proper warrant to relator as prayed.

J. L. BERRY,
S. J. WILSON,
Attorneys for Relator.

IN THE SUPREME COURT OF MISSOURI,
April Term, A. D. 1878.

State of Missouri, *ex rel.* Wm. W. Watkins, *Plaintiff*, *vs.* John P. Walker *et al.*, Justices of Macon County Court, *Respondents.*

Appeal from the Circuit Court of Macon County.

The respondents come and move the court to make an order docketing the above entitled cause as of the present term of this court, and after the same shall have been docketed then to advance the same on the docket, so that said cause may be submitted to this court under its 21st rule, for the following reasons, namely:

Because an appeal was taken in said cause by the relator on the 29th day of January, A. D. 1878, during the January term A. D. 1878, of the circuit court of Macon county, and more than thirty days before the first day of the present term of this court, and the relator failed or neglected to cause to be filed a perfect transcript of the record in said cause in the office of the clerk of this court at least fifteen days before the first day of the present term of this court, so as to entitle said cause to be regularly docketed for said term, as it was his duty to have done. But he caused a perfect copy of the record in said cause, and also ten printed copies of said record, together with ten printed copies of the argument of his counsel for him in said cause, to be filed in the office of the clerk of this court on the 29th day of April, A. D. 1878, and marked said printed copies of the record and argument, "Submitted under 21st rule," with a view and for the express purpose of obtaining a decision of said cause during the present term of this court on said printed record and argument; and these respondents, as the justices composing Macon county court controlling, managing and representing the interests of Macon county, and believing that the interests of the citizens and tax-payers of said county would be greatly subserved and promoted by having the ques-

tion involved in said cause decided by this court as speedily as possible, desire to have said cause docketed, then advanced on the docket, and submitted on said printed copies of the record, and the printed argument of their counsel, which will be filed herein on their part in a short time, to the end that said cause may be taken up by this court and decided as speedily as it can be done, and the question in controversy thereby settled, and the rights of the relator and the liabilities of Macon county in the premises ascertained and established.

And for the further reason that judgments to the amount of from $50,000 to $60,000 have been rendered in the circuit court of the United States for the western district of Missouri, and in the circuit court of Macon county in favor of divers persons, and against said county on bonds and coupons attached to bonds issued by Macon county to the Missouri and Mississippi R. R. Company, and said judgments are standing in full force, unreversed and unpaid, and in two of said judgments in said circuit court of the United States for the western district of Missouri, alternative writs of mandamus have been sued out against these respondents as justices of Macon county court, commanding them to draw warrants on the common fund of Macon county in favor of the plaintiffs in said judgments for the respective amounts thereof, or to show cause why they should not do so; and on the return made by these respondents to one of said writs, said circuit court of the United States for the western district of Missouri sustained a demurrer to said return, and on the 6th day of May, 1878, ordered a peremptory writ of mandamus to be issued against these respondents, commanding them to draw a warrant in favor of the relator therein on the common fund of Macon county for the amount of his judgment.

And these respondents are threatened with other writs of mandamus, and they will be issued against them in a short time, unless this court shall decide that the plaintiffs in said judgments are not entitled to have war-

rants drawn on the common fund of said county for the amount of their respective judgments.

And for the further reason that Clark county, Knox county and Chariton county, as well as Macon county, have subscribed large amounts to said Missouri and Mississippi Railroad Company, and issued bonds in payment thereof, and judgments for large amounts have been rendered against all of said counties except Chariton, on said bonds and the coupons attached to them—and the citizens and tax payers of all said other counties besides the citizens and tax payers of Macon county are vitally interested in the speedy decision of the question involved in this case. For if the doctrine of the relator is to prevail, then under the limitations of the constitution and statutes of this State in regard to the levying of *county* taxes, the levy is absorbed by the expense necessarily incurred in running the county *government*; so there is not and will not be any money left in the county treasury with which to pay said judgments or any part thereof; and if warrants were drawn on the county fund of the county in favor of the relator and other plaintiffs in said judgments, they, under the statutes of this state, would have to be paid in the order of their presentation so long as there might be any money belonging to the common fund in the treasury; and when all paid out, there would be a virtual disorganization of the *county* government. This case then presents itself to the court as one possessing all the elements necessary to have it docketed, advanced, submitted and decided as speedily as it can be, having due regard to the business before the court and the other public interests, for this case involves the interests of a considerable portion of the public.

J. W. RORERTS,
Prosecuting Attorney for Macon County.

James Carr, B. G. Barrow, of Counsel.

This case involves the interests of the citizens of *four* counties, and in this respect it is different from an ordinary case between two or more citizens only. Both

parties are not only *consenting* to have this case docketed, advanced and submitted under the 21st rule, but they are anxious to have the case decided by this court and the rights and liabilities respectively ascertained and settled. *Interest reipublicae ut sit finis litium.* It is a power inherent every court to take up and dispose of the business before it at its own will and pleasure, unless there is some statutory prohibition. In this case there is no such prohibition.

This court has just the same authority to make the desired order in this case as it had to establish rule 21. And no lawyer has ever questioned the authority of this court to make that rule.

Mere *technical* rules and forms should not stand in the way in a case of this magnitude. It is the constant practice in the supreme court of the United States on motion to advance causes in which the United States and the states are interested. Why should not this court advance cause in which four whole counties are interested?

J. W. ROBERTS,
Prosecuting Attorney for Macon County.

James Carr, B. G. Barrow, of Counsel.

On the back of said motion appears the following endorsement, to-wit:

THE STATE OF MISSOURI, *ex rel.* William W. Watkins,
against
John P. Walker *et al.*, Justices of Macon County Court.

Motion to docket, advance and submit cause under 21st rule.

Sustained, and cause advanced and submitted.

Filed May 13, 1878.

HENRY W. EWING, *Clerk.*

RULE 21.

Whenever, within the first thirty days of any term of this court, the counsel on both sides of any cause shall present to the court (by delivering the same to the clerk) ten printed copies of the record, or of a statement agreed upon, as presenting the full history of the cause, together with ten printed copies of the arguments on both sides, and submit the cause to the court upon such printed record or statements and arguments, the court will, without regard to the place on the docket of the cause so submitted, consider and decide the same as if it had been reached in its regular order, argued and submitted on the day when it shall be submitted under this rule. The record (or statement) and the arguments in such case shall be endorsed in manuscript thus: "Submitted under rule 21," and signed by the respective counsel.

IN THE SUPREME COURT OF MISSOURI,
OCTOBER TERM, 1878.

STATE OF MISSOURI, *ex rel.* William W. Watkins, appellant, *vs.* J. P. Walker *et al.*, Justices County Court of Macon County, respondents; mandamus.

OPINION OF THE COURT.

This is a proceeding instituted in the circuit court of Macon county *vs.* the defendants as justices of the county court of Macon county to compel them by mandamus to draw a warrant on the county treasurer of said county, payable out of the general expenditure fund. It is alleged in the petition that the relator obtained judgment in the circuit court of Macon county for the sum of $3,645 against said county on certain bonds issued and delivered to the Missouri & Mississippi Railroad Company in payment of a subscription of stock to said company made under and by virtue of the charter of said company; that said judgment is unpaid, and that the county has no property out of which said judgment, or any part thereof, could be made on execution; that the levy of one-twentieth of 1 per cent. on the assessed value of the taxable property of said county is wholly insufficient to pay said judgment and other judgments now subsisting against the county on other bonds issued to said company; that defendants upon demand made, refused to issue their warrant to relator in discharge of said judgment to the county treasurer, payable out of the common fund of the county.

The defendants in their return to the alternative writ admit all the facts stated in the petition, and set up by way of further returns that the stock was subscribed and the bonds issued to said company under the following provisions of the thirteenth section of said charter, which is as follows:

"It shall be lawful for the corporate authorities of any city or town, or county court of any county desiring

so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed 1-20 of 1 per cent. upon the assessed value of the taxable property for each year."

That in and by virtue of the power thus conferred, and no other, the said county court, without a vote of the people, and against the wishes of a large majority of the people, subscribed on the 16th of April, 1867, $175,000 to the capital stock of said company, and also on the 12th of April, 1870, made a like subscription of the further sum of $175,000 under the same authority and no other, without a vote of the people and against the wishes of nine-tenths of the voters of said county; that the county court of said county has levied every year, since such subscriptions were made and bonds issued, a special tax of 1-20 of 1 per cent. on the assessed value of all the taxable property in said county, which tax has been regularly collected and applied to the payment of said bonds and interest; that the tax thus collected was wholly inadequate to pay all the interest on said bonds; that the constitution of 1875, section 11, article 10, limits the power of the county to impose a tax for county purposes to 50 cents on the $100 valuation; that section 165, chapter 118, Wagner's statutes, provides that the "several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes, but the tax shall in no case exceed 1-2 of 1 per cent. on all taxable property." That the tax thus authorized to be levied constitutes the common fund of the county, and that the whole amount thus raised is necessary to pay the current and necessary expenses of conducting the county government, and that no part of this fund is applicable to the payment of relator's judgment, and that a withdrawal of it for such a purpose would disorganize the county government.

A demurrer to this return was overruled and judg-

ment was rendered for defendants, from which plaintiff has appealed.

The record presents for our determination the simple question whether the common fund of the county, collected for the purpose of defraying the current expenses of the county government, is applicable to the payment of relator's judgment, and whether the county court can be compelled to draw a warrant on the treasurer payable out of said fund.

Without stopping to consider or determine whether, after a demand against a county has been put into judgment, mandamus will lie to compel the county court to issue its warrant on the treasurer in payment of same, we will proceed to the discussion of the question presented by the record. The only authority upon which the relator relies for issuing the bonds, is to be found in the 13th section of an act to incorporate the Missouri and Mississippi Railroad Company, acts 1865, p. 86, which declares that "it shall be lawful for the corporate authorities of any city or town, or the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed the 1-20 of 1 per cent. upon the assessed value of the taxable property for each year."

This section has been construed by this court, in the case of the State *ex rel, vs.* Shortridge *et al.*, 56 Mo., 126. It was there held that section 13 of said act entered into and formed a part of the bonds themselves as much so as if it had appeared, *in hæc verba*, on their face; and that the effect of said section was to limit the power of the county court to a levy of a tax of 1-20 of 1 per cent. for their payment in any one year; and that this limitation was for the benefit of the tax-payer, and forbids the imposition of any greater tax than 1-20 of 1 per cent. in any one year by the county court. The principle announced that section 13 of the act entered into the contract finds support in the case of Von Hoff-

man *vs.* the City of Quincy, 4th Wallace, 554, and Cooley Con. Lim., 285.

It was also held that the power of taxation belongs alone to the State, and can only be exercised by virtue of laws passed by the General Assembly for that purpose, and that there can be no such thing as an implied power in a county court to levy a tax.

We are disposed to adhere to the principles enunciated in that case, believing them to be supported both by reason and authority, and adhering to them we are forced to answer the question this record presents in the negative.

If, as was decided in that case, the county court of Macon county could not be compelled by mandamus to levy a tax in excess of 1-20 of 1 per cent. to raise revenue with which to pay such bonds and the interest on them as constituting the right of action on which the relator obtained his judgment, we are at a loss to perceive upon what principle the court could be compelled, by mandamus, to seize upon other funds in the treasury of the county, raised for another and different purpose, and apply them to an object not contemplated when the tax, which brought the revenue into the treasury, was imposed.

The fact that the bonds and coupons have been put into a judgment can neither enlarge nor diminish the powers of the county court in regard to providing for payment by levying a tax. To compel the county court to divert the common fund of the county from the purposes for which they had the lawful right to impose the tax, which produced these funds, and apply it to a purpose for which they had no lawful right to impose a tax beyond the limit prescribed by law, viz: 1-20 of 1 per cent. would be doing indirectly, and by evasion, what we have decided could not be done directly. We can give no toleration to such a doctrine.

The very law authorizing the issuance of the bonds and coupons upon which relator obtained his judgment

provided for raising a specific fund out of which they were to be paid. This law entered into and formed a part of the contract, and when the subscription was made and the bonds issued to the company in payment of it, the company and all others into whose hands they might come are chargeable with knowledge of the fact that they were to look for payment to a specific fund to be provided by the levy of a tax not in excess of 1-20 of 1 per cent. It is no answer to say that the fund provided is inadequate. The inadequacy of the fund to discharge the obligation cannot confer either on the county court or any other court the power to provide any other fund to meet the obligation than that which the law authorizing the contraction of the debt had provided.

If the county court in subscribing $350,000 of stock and issuing that amount of bonds to pay it, issued an amount in excess of what a tax of 1-20 of 1 per cent. would pay, the company could have refused to accept the subscription on that ground. This, however, was not done.

The amount of bonds and interest that an annual tax of 1-20 of 1 per cent. would pay could have been ascertained almost to a mathematical certainty at the time the subscription was made and the bonds issued. Prudence on the part of the county court would have confined them to a subscription and the issuance of bonds to an amount which the fund authorized by the Legislature to be raised would pay, and fair dealing would have required the company to have refused to accept a subscription in excess of what could have been paid by it.

The intention of the Legislature in conferring the power of the county court to subscribe stock to this company to be exercised independent of, and even against the will of the tax-payers, doubtless was to confine them to such a subscription in amount as an annual tax of 1-20 of 1 per cent. on all the taxable property would pay, and it may seriously be questioned whether the bonds issued in excess of that amount have any binding force.

If section 13 of the act of 1865 entered into and formed a part of contract which this court in the case of State *ex rel. vs.* Shortridge, *supra*, declared it did, then it follows under the following cases heretofore decided, that the holders of the bonds can only look to the fund which section 13 provides, and when that is exhausted they have no authority of law to demand of the county court that they resort to another and different fund provided for other and different purposes.

In the case of Campbell against Polk County, 49 Mo., 214, it was held that when a county warrant was made payable out of a particular fund, the holder of such warrant after such fund had been exhaustsd could not recover against the county in an action thereon.

In the case of Pettis County *vs.* Kingsbury, 17 Mo., 479, it was held that a contractor who had built a bridge to be paid for out of the road and canal fund could not compel the county to pay a warrant (drawn payable out of said fund) with the common fund of the county.

In the case of Kingsbury *et al. vs.* Pettis County, 48 Mo., 208, the doctrine of the above cases were approved.

Considering section 13 as entering into the contract in this case as fully as if it had been copied on the face of the bond, the legal effect of it is to make the bonds payable out of the special fund there provided for that purpose, and to bring this case within the principle announced in the above cases.

The contract made between the county and the Missouri and Mississippi Railroad Company was that if the county court subscribed for stock in said corporation the company would accept bonds therefor, to be paid by funds derivable from a tax of 1-20 of 1 per cent., to be annually levied on the assessed value of all the taxable property in said county.

The record before us shows that this contract thus made has been fully executed. The county court made the subscription which the company accepted, and it received the bonds of the county therefor, to be paid as

section 13 of the act of incorporation provided, and the tax therein authorized to be levied has been regularly levied, and the proceeds so far as they would go have been applied to the payment of said bonds. If the contract and the law which authorized it to be made have been fully complied with, that is an end of the matter, and is all that the plaintiff is entitled to. And if for the purpose of paying these bonds the county court of Macon county was powerless, as we have decided, to levy a tax exceeding one-twentieth of 1 per cent., it necessarily follows that they cannot be forced to pay them out of funds raised by taxation for a different purpose. If this were allowed to be done, it would be equivalent to enlarging the powers of the county court and giving them a right to levy a tax greater than 1 20 of 1 per cent. for the purpose of paying these bonds, which this court in the State *vs.* Shortridge, *supra*, held they could not do, but were forbidden to do. They could no more be compelled to pay a warrant drawn upon the treasurer, payable out of the general expenditure fund, out of the fund authorized to be raised by section 13, *supra*, than they could be compelled to pay out of the general fund of the county a bond issued under section 13, which provides a special fund for its payment. It will not be pretended that the holder of a warrant payable out of the general expenditure fund could compel, by mandamus, the county court to take the special fund which section 13, *supra*, provides for the specific purpose of paying the bond issued thereunder and apply it to the payment of such warrant, and we do not see how the holder of a claim, payable out of this special fund, can compel the county court to resort to the common fund of the county to pay it, any more than the holder of a warrant to be paid out of the common fund can enforce its payment out of this special fund.

The simple fact that the tax authorized to be levied will not bring sufficient money into the treasury to pay the bonds will not justify us, in the language of Judge

Scott, in the case of Pettis County *vs.* Kingsbury, "by a kind of judicial midwifery deliver the statute of an interpretation" which would give to the county court of Macon county a power that we have held they could not under the law exercise.

If the tax provided is insufficient to meet the payment of the bonds and interest intended to be paid by it, it demonstrates either a deficiency in the law, which we have no right to remedy, or an unwise exercise of power by the county court in issuing a larger amount of bonds than the tax they were allowed to impose would pay, and the folly of the company in accepting such a subscription. It may have been a hard bargain, an unwise and imprudent contract that was entered into between the county and the corporation it was contracting with. We have no power to change it or to alter its terms. Our simple duty is to enforce it as the parties themselves have made it. The time may yet come when the sanguine expectations of the promoters of the project of the development of the county and the increase of its wealth will be realized, and that a tax of 1-20 of 1 per cent. will raise a fund adequate to the discharge of the obligation.

We have a right to presume that a purchaser of these bonds, chargeable with knowledge of the fact that the county court had no legal power to impose a greater tax than 1-20 of 1 per cent. to pay them, would be governed by it in fixing the price he would be willing to pay for such paper.

We also have a right to presume, from the fact stated in the return and admitted by the answer, that only seventeen miles of the road were built, and this entirely outside of Macon county; that this fact was considered, and that the bonds brought but an inconsiderable sum.

To give section 13, *supra*, the interpretation contended for by relator would make it operate as a practical fraud, both on the county court and the people whose

faithless agent the court was, if the fact admitted by the demurrer, that the bonds were issued against the protests of nine-tenths of the people, be true. The county court, as well as the people, had a right to conclude that the legislature intended that for the payment of the bonds issued by the county under the charter the people should not be taxed beyond the limit prescribed in the act, and that, if they issued an amount of bonds in excess of what they would pay, then the company, as well as others, would take them at their peril and subject to such future increase of the assessable value of property in the county as would ultimately secure their payment.

In the case of Supervisors *vs.* United States, 18 Wallace, 77, it is observed that "a mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state, from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. The office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing."

The same doctrine as to the character of such officers is asserted in the case of Reardon *vs.* St. Louis County, 36 Missouri, 560.

In the light of these adjudications, and to a proper determination of the question presented by the record before us, it is important to ascertain for what purpose the common fund of the county can be applied. This is especially so in view of the act of 1874, page 45, which provides as follows:

"That if any person, * * * being a member of any court * * * shall knowingly vote for the appropriation, disposition or disbursement of any money or property belonging to any such * * * county other than the specific use for which the same was devised, appropriated and collected, or authorized to be

collected by law. * * * Such person so voting for, aiding, advising or promoting such illegal appropriation, disbursement or disposition of any such money or property, shall be deemed and taken, if such illegal appropriation, disbursement or disposition of such property be in fact effected, to have feloniously embezzled and converted said money or property; and if such illegal appropriation, disbursement or disposition be not effected then such person so voting, advising or promoting the same shall be deemed to have feloniously attempted to embezzle and convert to his own use such money or property, and on conviction thereof shall be punished by imprisonment in the penitentiary for a period not exceeding five years, and by a fine not exceeding fourfold the value of such money or property."

What, then, are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. The law is to be found in Wagner's statutes, 1193, section 165, and is as follows: "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, * * * but the county tax shall in no case exceed one-half of 1 per cent."

The revenue derived from the tax thus authorized to be annually imposed, in the very terms of the law declared to be to defray the expenses of the county, which we understand to mean the ordinary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in supporting the poor and insane of the county, salaries of officers, assessing and collecting the revenue, etc.

That an extraordinary indebtedness incurred by a

county in subscribing stock to a railroad corporation and in issuing bonds in payment was never intended by the General Assembly to be embraced in the words "expenses of the county," or that they contemplated the creation of any debt for county purposes is manifest from section 166, which makes it the duty of the county court after the assessor's book has been adjusted and returned "to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum." If section 165, *supra*, was intended to authorize the creation of debts or provide for their payment, the General Assembly would doubtless have so expressed themselves as they did in sections 1 and 7, p. 1,168, of the same law in providing for the levy of State taxes. Section 1 provides that for the support of the government of the State, the payment of the State debt, * * * taxes shall be levied on all property, real and personal, * * * and section 7 provides that there shall annually be levied, assessed and collected on the assessed value of all the real and personal property subject to taxation in the State 1-5 of 1 per cent. for State revenue and 1-4 of 1 per cent. for the payment of all State indebtedness.

The State revenue thus provided is in express terms for the support of the State government, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription was not intended to be embraced in the terms "expenses of the county," is apparent when it is considered that the very same word used by the General Assembly in section 165, are to be found in section 20, Revised Statutes, 1825, p. 671, except in the latter act, the tax authorized was limited to 50 per cent. of the amount of State tax.

The same section was continued in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of the State tax.

It is also to be found in the Code of 1845, and that of 1855, the only difference being, that in the former the rate of taxation was not to exceed thirty-four cents and in the latter not to exceed 40 cents on a valuation of $100.

It is clear that the General Assembly in 1825 and in 1835, when they authorized the county courts to levy such tax from time to time as shall be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to the stock of a railroad corporation, because at that time there was no law to be found on our statute books authorizing such subscriptions or the issuance of any such obligations.

The first statute conferring such authority was in 1837, acts 1837, p. 247. The identical provisions of the codes of 1825 and 1835 having been continued or transferred on the revised codes of 1845, 1855 and 1865, we are justified in concluding that they were transferred with the same meaning as when first adopted, and that it was not designed to include in the county expenses therein provided for, bonds issued by a county in payment of a railroad subscription. This conclusion, we think, is fully confirmed by the fact that as early as 1855, the General Assembly made other and different provisions for levying a tax and creating a fund for the payment of such obligations. This will be seen by reference to sections 30, 31, 32 and 34 of the Revised Statutes, 1855, vol. 1, p. 427-9.

Section 30 provides that it shall be lawful for the county court of any county * * to subscribe to the capital stock of any railroad company duly organized under this or any other law of this State.

Section 31 provides that when such subscription is made, that in order to raise funds to pay it, it shall be the duty of the county court making such subscription to issue bonds or levy a special tax upon all "property and taxables" made taxable by law for State and county

purposes and upon the actual capital that all grocers and merchants may have invested in business, * * to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription. The only limitation on this is, that it shall not exceed in any one year 30 per centum of the subscription.

Section 32 provides, "That for such taxes levied the county court shall cause to be issued and delivered to persons paying such tax, a certificate of the amount thereof paid, which certificates shall he transferable and convertable into stock of the railroad whenever presented in amounts equal to one or more shares of the stock of such railroad." It also declares that the assessment, collection and payment of the taxes authorized shall be enforced as any other taxes for county or highway purposes.

Section 34, provides that "Any County Court or city which has heretofore subscribed to the capital stock of railroad in this State shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the County Court or City Council shall have all the rights and powers to provide funds to pay such subscriptions as are granted to County Courts, and cited under this act, and may levy a special tax to pay the interest on their bonds, or provide sinking fund to pay the principal."

Sections 17, 18, 19 and 21 of the Gen. Stat., 1865, p. 338-9, are in all respects like those contained in the revised code of 1855, except the power of the County Court to subscribe is made dependent upon the assent to such subscription of two-thirds of the qualified voters of the county, expressed at a regular or special election to be held therein.

It thus appears that the fullest provisions have been made by the General Assembly for the creation of a fund distinct from the general expenditure or common fund of a county out of which to pay an indebtedness incurred by a county on account of a subscription to stock of a

railroad company or bonds issued in payment thereof, which fund is to be kept separate from all other funds, and to be applied to that identical purpose and none other. These various provisions of the law have been referred to for the sole purpose of establishing the proposition that for the payment of such obligations, resort could only be had to the special fund, and that it never was the intention of the Legislature that the common fund raised by taxation to defray the expenses of the county could be made chargeable with their payment, but on the contrary that such latter fund was devised, provided and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government, as has been hereinbefore indicated.

We therefore think that it is manifest that the fund raised by a tax of one-half of 1 per cent. to defray the expenses of the county, cannot be applied to the payment of relator's demand, and it follows that each member of the County Court of Macon county, who would knowingly vote for so applying it, and thus diverting it from the purpose for which it was collected, would be guilty of a crime and subject himself to the penalty of the act of 1874, *supra;* and as manadamus will not issue to compel an officer to do that which he is not only not authorized, but absolutely forbidden to do, the trial court was justified in denying the writ.

Again, the demurrer was properly overruled, on the ground that the effect of granting the writ would be to disrupt and disorganize the county government. It is shown by the return that the taxable value of the property in the county was $4,853,584, and that the revenue, which a tax of one-half of 1 per cent. thereon would produce, is required in carrying on the county government, and after applying it to that purpose there would be nothing in the treasury with which to pay a warrant, if drawn.

In the case of Price *v.* County Commissioner Philadelphia county, 1 Whar. Rep. p. 1, which was a proceeding to compel by mandamus the County Commissioners to

draw orders on the County Treasurer in payment of certain claims against the county, it is observed by the court "that it appears by the affidavit of the Commissioners that there is no money in the treasury except that which is wanted to defray the ordinary expenses of the county. The writ of mandamus is not of course. It will be granted when a plain case of necessity is shown, and when in the discretion of the court it appears advisable. In this we should probably stop the wheels of the county government if the mandamus were allowed." The writ was denied.

So in the case of Commonwealth *v.* Commissioners of Lancaster county, 6 Binney, page 5, which was a proceeding to compel the Commissioners to draw an order on the Treasurer for $58,444, the court observes "that the Commissioners say they ought not to draw the order because there is not money in the treasury sufficient to answer it. No doubt they speak the truth, and it appears to be cause insurmountable against issuing the writ. Whether the Commissioners have done wrong in not taking measures to bring money into the treasury is not now the question, if they have in law no power to punish them in this way. What would it signify to draw a warrant on an empty treasury? The Treasurer would refuse payment, and there the matter would end."

The same principle is announced in case of Coy *v.* City of Lyons, 17 Iowa, 1; Coffin *v.* City of Davenport, 26 Iowa, 315; 36 Iowa, 401, and also section 352, High Ex. L. R.

At the time the subscription was made and the bonds of Macon county were issued in payment of it, section 165, *supra*, was the only law authorizing the County Court to levy a tax to raise money out of which to defray the expenses of the county, and this tax could not exceed one-half of one per cent. Under section 11, article 10 of the Constitution, it is provided that the annual rate of taxation on property in counties having $6,000,000 or less, shall not

in the aggregate exceed 50c. on each $100 valuation. While this restriction applies to taxes for county purposes, it is expressly provided in the same section that "it shall not apply to taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness." It is therefore manifest that the county court of Macon county (the property in said county being less than $6,000,000 in valuation) cannot levy nor be authorized to levy for county purposes a tax in excess of 1-2 of one per cent. in each year.

It is also manifest from the return that if the fund arising therefrom is diverted from such purpose that the county government will be overthrown and left without support. When it is considered that the State is dependent upon the machinery of its county governments for the assessment and collection of taxes for its support, and the payment of its debt, we cannot so exercise our discretion as to direct the issuance of a writ in this case and thus establish a principle tending to overthrow the county governments, and thus to impair the power of the State to maintain itself.

The writ was properly denied to relator, because the principles of law governing courts in granting it do not accord it to him.

The office of mandamus is "to compel the performance of ministerial acts or is addressed to subordinate judicial tribunals, requiring them to proceed to exercise their functions and give judgments in cases before them. Mandamus will not lie to compel an inferior tribunal to give a particular judgment or to reverse its decision when it has once acted, its peculiar scope and province being to prevent a failure of justice from delay or refusal to act. When the subordinate tribunal acts judicially it may be compelled to proceed, but it will be left to decide and act according to its best judgment. In such cases the party aggrieved by the decision has his remedy either by appeal or writ of error, and mandamus never

issues, except when the petitioner has a specific right and no other remedy." State *ex rel. vs.* Lafayette county, 41 Mo. 224.

It therefore becomes important to determine whether defendants, in discharging the duties imposed upon them of ascertaining the amount due from the county and ordering a warrant on the treasurer therefor, were acting judicially or ministerially.

The answer to this question is to be returned by the law which imposes the duty, and it is as follows:

"When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form: Treasurer of the county of ——— ——— pay to ——— dollars out of any money in the treasury appropriated for county expenditures (or express the particular fund as the case may require). Given at the court house this—— day of——18—.

By order of the county court.

Attest: A. B., President.

C. D., Clerk.

Section 31, Wagner's Statutes, 415.

Under this section, before any warrant can be drawn on the treasurer, the court must first ascertain the amount due and the fund out of which it is to be paid, and under section 28, of the same act, it is clothed with all necessary judicial power to perform the duties thus devolved upon it. We therefore think that in the ascertainment of what is due from a county and the fund out of which it is to be paid (both of which must be determined before a warrant can be drawn), the court is acting judicially. This principle is fully enunciated in the case of the International Bank of St. Louis *vs.* Franklin county, 65 Mo., 112.

When a demand against a county is presented to the county court the usual form of entry may be exemplified thus:

A. B., *vs.*——county. The account of A. B., for the sum of——dollars being presented and inquired into, it is found by the court that the sum of——dollars is due him from the county, payable out of (the general expenditure fund, or road and canal fund, bridge fund, railroad tax fund, interest fund, as the case may require), and for which the clerk is ordered to issue a warrant.

One of these judicial functions we are called upon in this proceeding to perform for the county court, viz: to determine the fund out of which relator's claim is payable, and then command the court not to proceed and render a judgment, but to execute the judgment rendered by this court. This, under the authorities cited, we cannot do. The utmost that we could do would be to direct the county court to proceed and render judgment when they refused to act, and if in acting it renders a wrong judgment the remedy is by appeal, which is allowable under our statute, from all judgments and orders from the county court when not expressly forbidden.

But conceding, only for the argument, that the county court in ordering a sum of money ascertained to be due from the county to be paid out of a particular fund, is acting ministerially, still the relator would not be allowed the writ of mandamus unless he had no other remedy, it being well settled that such writ only issues when the party has no other remedy. If, in such case, the county court err in directing the payment of such claim out of the wrong fund, our statute affords an ample remedy by appeal from the wrongful order, for it expressly provides that the "circuit courts shall have appellate jurisdiction from the judgments and orders of county courts and justices of the peace, in all cases not expressly prohibited by law"—Sec. 2, Wag. stat., 430.

It has been determined that this appellate jurisdiction of the circuit courts can be exercised by appeal. County of Boone *vs.* Corlew, 3 Mo. 12, Lewis *vs.* Nuckols, 26 Mo., 279; Lacy *vs.* Williams, 27 Mo., 280. So that it appears, whether the county court, in ordering the pay-

ment of a sum of money ascertained to be due from the county out of a particular fund, is acting either judicially or ministerially, the relator would not, in either case, be entitled to the writ, for if defendants were acting in the former capacity we cannot control their judicial discretion by directing them to give a particular judgment, as the judgment that they shall render is for them and not for us to determine; if acting in the latter capacity and they make an erroneous order the party aggrieved has his remedy by appeal. It therefore follows that in either instance the writ of mandamus must be refused, in the first, because we cannot thus interfere with judicial discretion, and in the latter because there being a remedy by appeal, in such case mandamus does not lie. United States *vs.* Lawrence, 3 Dall., 42; Griffith *vs.* Cochran, 5 Binney, 87; 14 East., 395.

We have been cited to the case of the United States *vs.* Clark county, 6 Otto, 211, in support of relator's case. The opinion in that case, emanating from the highest recognized authority in this country, did not meet with the sanction of a large minority of the court. This, in connection with the fact that it was expressly decided in the case of the State *vs.* Shortridge, *supra*, that section 13, *supra*, of the act incorporating the Missouri and Mississippi River Railroad Company was a limitation on the power of the county court to levy a tax beyond the amount therein specified, and the further fact that the various acts to which we have referred herein, were neither called to the attention of the court nor considered, we are driven to a different conclusion from that announced in that case.

The judgment of the court in overruling the demurrer and refusing the writ is affirmed, in which Judges Sherwood and Henry concur. Judge Hough concurs in a separate opinion. Judge Napton having been of counsel in the case of the State *ex rel. vs.* Shortridge, did not sit.

E. H. NORTON.

A. B., *vs.*——county. The account of A. B., for the sum of——dollars being presented and inquired into, it is found by the court that the sum of——dollars is due him from the county, payable out of (the general expenditure fund, or road and canal fund, bridge fund, railroad tax fund, interest fund, as the case may require), and for which the clerk is ordered to issue a warrant.

One of these judicial functions we are called upon in this proceeding to perform for the county court, viz: to determine the fund out of which relator's claim is payable, and then command the court not to proceed and render a judgment, but to execute the judgment rendered by this court. This, under the authorities cited, we cannot do. The utmost that we could do would be to direct the county court to proceed and render judgment when they refused to act, and if in acting it renders a wrong judgment the remedy is by appeal, which is allowable under our statute, from all judgments and orders from the county court when not expressly forbidden.

But conceding, only for the argument, that the county court in ordering a sum of money ascertained to be due from the county to be paid out of a particular fund, is acting ministerially, still the relator would not be allowed the writ of mandamus unless he had no other remedy, it being well settled that such writ only issues when the party has no other remedy. If, in such case, the county court err in directing the payment of such claim out of the wrong fund, our statute affords an ample remedy by appeal from the wrongful order, for it expressly provides that the "circuit courts shall have appellate jurisdiction from the judgments and orders of county courts and justices of the peace, in all cases not expressly prohibited by law"—Sec. 2, Wag. stat., 430.

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ment of a sum of money ascertained to be due from the county out of a particular fund, is acting either judicially or ministerially, the relator would not, in either case, be entitled to the writ, for if defendants were acting in the former capacity we cannot control their judicial discretion by directing them to give a particular judgment, as the judgment that they shall render is for them and not for us to determine; if acting in the latter capacity and they make an erroneous order the party aggrieved has his remedy by appeal. It therefore follows that in either instance the writ of mandamus must be refused, in the first, because we cannot thus interfere with judicial discretion, and in the latter because there being a remedy by appeal, in such case mandamus does not lie. United States *vs.* Lawrence, 3 Dall., 42; Griffith *vs.* Cochran, 5 Binney, 87; 14 East., 395.

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The judgment of the court in overruling the demurrer and refusing the writ is affirmed, in which Judges Sherwood and Henry concur. Judge Hough concurs in a separate opinion. Judge Napton having been of counsel in the case of the State *ex rel. vs.* Shortridge, did not sit.

E. H. NORTON.

SEPARATE OPINION BY HOUGH, J.

I concur in affirming the judgment of the circuit court refusing the writ of madamus, but do not concur in all the reasons given therefor. I adhere to the decision of this court in the case of the State *v.* Shortridge, 56 Mo., 126, and if this were a proceeding to compel the county court to levy a tax to pay the bonds, it would be directly in point. I doubt, however, whether we are at liberty to go behind the judgment in favor of the relator, and inquire into the cause of action, or obligation upon which it is founded and then say that the judgment must be paid according to the terms of the contract on which it is based. The judgment should have followed the contract; and in that it does not, it is an erroneous judgment; it is a general judgment, entitling the relator to a general execution, and if the county has property subject to execution, it might be sold thereunder. The contract is merged in the judgment, and it cannot, in my opinion, now be looked to to determine the rights of the relator under his judgment. Sufficient reasons are given in the opinion of the court for refusing the writ without going behind the judgment in favor of the relator.

STATE OF MISSOURI—*ss.*

I, Henry H. Ewing, clerk of the supreme court of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings of the Macon county circuit court, in the case of the State of Missouri at the relation and to the use of William W. Watkins, appellants, John S. Walker, Geo. L. Towner and Lee Lingo, justices of the county court of Macon county, respondents, filed in my office on the 29th day of April, 1878; of the brief of J. S. Berry and S. J. Wilson, attorneys of record for the said appellant, filed in said court on the 29th day of April, 1878; of the motion of said respondents to docket said cause, to advance

the same on the docket, and for leave to submit the case under rule XXI of the court as well as the action of said court evidence by endorsement on the back of said motion, of the rule XXI of said court, as the same appears on record in my office; and finally of the opinion delivered by said supreme court in said cause at its October term, 1878, and on the 30th day of October, 1878, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court. Done at office in the city of Jefferson, state aforesaid, this 23d day of November, A. D. 1878.

[SEAL.]

HENRY H. EWING, *Clk. Sup. Ct.*

BY CHAS. GUENTHER, *D. C.*

ORDER NO. 2.

Ordered by the court that a warrant be drawn in favor of W. W. Watkins on the M. & M. R. R. Fund for the sum of $3,790 73, it being the amount at this date of his judgment against Macon county in the Macon county circuit court.

A true copy of the order made by the Macon county court, April 10th, 1878.

JAMES M. LOVE, *County Clerk.*

Pleadings &

DECISION

BY THE

SUPREME COURT

OF PENNSYLVANIA

IN THE

PENN AVENUE BOND CASE,

RENDERED AT PITTSBURGH, NOVEMBER 18, 1878.

PRINTED BY J. B. LIPPINCOTT & CO., PHILADELPHIA.
1878.

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PETITION.

February 16, 1878.

This morning, in Common Pleas Court, No. 1, George Shiras, Jr., counsel for Henry Whelen and others, presented the following petition:

To the Honorable the Judges of the Court of Common Pleas, No. 1:

The petition of Henry Whelen respectfully represents:

That under, and in pursuance of the provisions of the Act of Assembly, approved the 2d day of April, A.D. 1870, and entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh," and of the supplements thereto, approved the 1st day of February, 1871, and the 20th day of March, 1872, extensive and costly improvements in the grading, paving, and curbing of Penn Avenue and other streets and avenues in the city of Pittsburgh have been effected; that during the progress of said improvements, for the purpose of providing for the payment of costs and expenses of the same, and in pursuance of the provisions of the said Acts of Assembly, the Commissioners elected to control and superintend the said work made requisition upon the Mayor of the city of Pittsburgh for the issue of bonds of said city; that the said Mayor, in the performance of a duty devolved upon him in and by the said Acts of Assembly, did, from time to time, make and execute bonds in the name of said city, to an amount not exceeding the amount of contract price of said improvements and the incidental expenses attending the same, aggregating the sum of $5,823,800; that said bonds were signed by the Mayor, and countersigned by the Controller, and sealed with the corporate seal of the city; that said bonds bear interest,—a portion at the rate of six and a portion at the rate of seven per cent. per annum,—payable semi-annually at the office of the Treasurer of the city of Pittsburgh, as prescribed in said Acts of Assembly; that the said bonds were, from time to time, as the work progressed, delivered to the Commissioners having control of the respective

improvements, who sold and negotiated them, and paid all the moneys received therefrom to the Treasurer of the city of Pittsburgh; that said bonds, before they were delivered to the purchasers, were countersigned by the said Commissioners; that the proceeds of the sale of said bonds have, as your petitioner is informed and believes, been applied by the city of Pittsburgh to the payment of the cost and expenses of said improvements; that in pursuance of the provisions of the second section of the Act of February 1, 1871, the greater portion of said bonds have been presented by the holders thereof to the Treasurer of the city of Pittsburgh, to be registered as part of the debt of said city, and have been by him registered accordingly; that your petitioner is a member of the firm of Townsend, Whelen & Co., Philadelphia, is a holder and owner of bonds of the city of Pittsburgh, issued under said Acts of Assembly, amounting to the sum of $9500, and numbered as Nos. 85, 107, 108, 349, 352, 350, 351, 341, 344, 357, 324, 336; and that your petitioner is the agent of the Pennsylvania Company for Insurances on Lives and Granting Annuities, and of the Philadelphia Trust Safe Deposit Company, the Fidelity Insurance Trust and Safe Deposit Company, and of other institutions and parties, which said institutions hold large amounts and numbers of said bonds, so as aforesaid issued by the city of Pittsburgh for defraying costs and expenses of said improvements of the streets and avenues, and which said bonds are held by said institutions largely in trust for executors, guardians, and other trustees of minors and helpless persons, and which said bonds are declared by law to be legal investments of fiduciary moneys.

That there is in arrears and unpaid interest on said bonds issued in pursuance of said Acts to the amount of $398,514, all of which matured during the year 1877, and a somewhat larger amount of interest will mature during the year 1878; that there is also due and unpaid the further sum of $46,500, being the principal of bonds issued as a temporary loan under the provision of the Act of April 2, 1870, and which became due January 1, 1877. A detailed statement of said interest and of the said bonds and the date of maturity is appended hereto as a schedule marked "A"; that it is the duty of the Councils of the city of Pittsburgh to annually appropriate and apply out of the revenue of said city, derivable from all sources, and before the payment of the salaries of city officers, and before the payment of the or-

dinary current expenses of said city, sufficient moneys to the payment of the interest of the funded debt of said city; and it is further made the duty of the said Councils, by the twenty-second section of said Act of April 2, 1870, in case any interest shall become due on said bonds issued in pursuance of said Act, and there is no funds from which to pay the same, to make a temporary loan for the purpose of paying the same; that in disregard of their said duty, and notwithstanding the interest on said bonds remains in arrears and unpaid, as hereinbefore stated, the said Councils failed to assign and appropriate out of the revenue of said city any moneys to the payment of the interest of the funded debt of said city, so as aforesaid in arrears, and they have also failed to make a temporary loan for the purpose of paying the same.

That it is further the duty of said Councils to annually, in their appropriation ordinance, provide, assign, and appropriate sufficient moneys with which to pay the interest on the city funded debt from time to time becoming due, and to provide such moneys by directing the assessment and collection of the necessary taxes; that the said Councils, in disregard of said duty, have failed to enact an appropriation ordinance containing such provisions, and that portion of Councils known as Select Council has, at a recent session, stricken out of the appropriation ordinance, as reported by the Finance Committee, any and all appropriations for interest accruing and to accrue on the bonds issued in pursuance of the said Act of April 2, 1870, thus evidencing, as the petitioner believes and charges, an intention to fail and refuse to provide for the payment of said interest.

That by reason of the said wrongful neglect of said Council to make any provision whatever for the payment of said interest, so accrued and accruing on said bonds, your petitioner and other holders thereof have been unable to recover or receive the amount of interest now and for a long time due and unpaid, although they have demanded and endeavored to procure the payment of the same.

That your petitioner and the other holders of said bonds cannot have adequate relief in the premises without the aid of a writ of mandamus, commanding and enjoining the said Councils to forthwith make full and ample provision for the payment now due on said bonds, and that which shall become due thereon during the year 1878. That the said Councils be further commanded and enjoined, in and by said writ, to assign and appropriate, out of the revenue of said city derivable

from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears and becoming due, giving preference, if any difficulty should arise, to the payment of said interest, before the payment of salaries of city officers and the ordinary current expenses of the city.

Your petitioner, therefore, prays your Honors to award him the Commonwealth's writ of alternative mandamus, in pursuance of his foregoing suggestion, directed to the Select and Common Councils of the city of Pittsburgh, and the respective members thereof, whose names are as follows:

[Then follows a list of the names of members of Select and Common Councils.]

Upon reading of the petition, the Court gave to the petitioner leave to sue out a writ of alternative mandamus, directed to the members of Select and Common Councils, returnable on the 19th day of February, at 10 A.M.

WRIT OF MANDAMUS.

In the Court of Common Pleas, No. 1, *of Allegheny Circuit. No.* 1021, *March Term*, 1878. *The Commonwealth of Pennsylvania*, ex relatione *Henry Whelen* vs. *The Select and Common Councils of the City. State of Pennsylvania, County of Allegheny*, ss. *The Commonwealth of Pennsylvania to the Select and Common Councils of the City of Pittsburgh:*

Composed of Jacob Ahl, J. S. Atkinson, Samuel Barkley, John Baum, F. S. Bissell, John Bradley, L. T. Brown, Thomas Brown, D. D. Bruce, J. D. Buckley, W. J. Burns, R. H. Conway, P. Castillo, H. F. Dannals, William H. Denniston, J. K. P. Duff, Charles Evans, Martin Fagin, J. J. Flannery, A. W. Flaivers, A. W. Foster, W. S. Foster, Wm. J. Fullerton, Samuel Garrison, Henry J. Gaurley, Robert Gregg, Joseph Hays, Wm. A. Herron, Chas. Hilger, J. M. Hoeh, Geo. M. Holliday, Edward Hanston, John Hughes, D. Ihmsen, A. Keating, John Kelly, John M. Kennedy, Thomas Kernan, James Kerr, John S. Lambie, James Lappan, James Littell, John Londy, Wm. Minsinger, Thomas Miller, John G. MacConnell, John McClung, Wm. McClurg, P. McGee, Samuel McKinley, W. H. Nantker, R. H. Negley, W. W. Nesbett, George Noble, John Misser, J. C. O'Donnell, Reese Owens, Jas. W. Patterson, Robert A. Reed, Michael Rodgers, H. D. Palfe, Fred. Schild, John Shipton, J. N. Sterling, Wm. Taylor, H. E. Wainwright, Robert Watson, T. W. Welsh, A. G. McCandless, *Select Councilmen;* and to W. F. Aull, Samuel Belfore, T. J. Bigham, G. H. Blume, Fred. Dierst, Henry Doyle, Danual Egan, John Forsythe, E. Franenheim, S. H. French, W. J. Fennerty, P. Foley, B. Gallisath, Wm. Gallagher, P. J. Higgins, P. Hanlon, F. S. Hogle, M. Johnston, Jacob Kinzer, W. M. Kirchner, Frank Kohne, Charles Manning, R. M. McClarren, Newton McClarren, Neal C. McCafferty, Robert McKinley, Henry Nsntker, M. O'Donnell, W. S. Pier, G. G. Rahanser, Henry Rea, Jr., James Renziehansen, Albert Schuman, Charles Schwarm, W. W. Thompson, D. H. Voskamp, Jos.

G. Wainwright, Thomas Walker, George Wamhoff, F. H. Weisser, Robert Young, Wm. G. Negley, *Common Councilmen*, greeting:

Whereas, By an Act of Assembly of said Commonwealth, approved the 2d day of April, 1870, entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh," and by certain supplements thereto approved the 1st day of February, A.D. 1871, and the 20th day of March, A.D. 1872, certain improvements in the grading, paving, and curbing of Penn Avenue, and other streets and avenues in the city of Pittsburgh, have been effected.

And whereas, During the progress of said improvements, for the purpose of providing for the payment of the costs and expenses of the same, and in pursuance of the provisions of the said Acts of Assembly, the Commissioners elected to control and superintend said work made requisition upon the Mayor of the city of Pittsburgh for the issue of bonds of said city; and the said Mayor, in the performance of a duty devolved upon him in and by said Acts of Assembly, did, from time to time, make and execute bonds in the name of said city to an amount not exceeding the amount of the contract price of said improvements and the incidental expenses attending the same, and aggregating the sum of five million eight hundred and twenty-three thousand eight hundred dollars ($5,823,800).

And whereas, Said bonds were signed by the Mayor, and countersigned by the Controller and by the said Commissioners, and sealed with the corporate seal of said city, and bear interest, a portion at the rate of six and a portion at the rate of seven per cent. per annum, payable semi-annually, at the office of the Treasurer of the city of Pittsburgh, as prescribed by said Acts of Assembly.

And whereas, Said bonds were from time to time, as the work progressed, delivered to the Commissioners having control of the respectiv improvements, who sold and negotiated them, and paid the moneys received therefrom to the city of Pittsburgh.

And whereas, The proceeds of the sale of the bonds have, as we have been given to know, been applied by the city of Pittsburgh to payment of the costs and expenses of said improvements.

And whereas, In pursuance of the provisions of the second section of the Act of February 1, 1871, the greater portion of the bonds have been presented by the holders thereof to the Treasurer of the city of Pittsburgh to be registered as part of the debt of said city, and have been by him registered accordingly.

And whereas, Henry Whelen is a holder and owner of bonds of the city of Pittsburgh, issued under said Acts of Assembly, amounting to the sum of nine thousand five hundred dollars ($9500), and numbered as Nos. 85, 107, 108, 349, 352, 350, 351, 341, 344, 357, 324, and 336, and is agent for other parties holding large amounts of said bonds, so as aforesaid issued by the city of Pittsburgh, to defray the costs and expenses of said improvements of her streets and avenues.

And whereas, There is in arrear and unpaid interest on said bonds issued in pursuance of said Acts of Assembly, and held by the said Henry Whelen and others, to the amount of three hundred and ninety-eight thousand five hundred and fourteen dollars ($398,514), all of which matured during the year 1877, and a somewhat larger amount will mature during the year 1878.

And whereas, There is also due and unpaid the further sum of forty-six thousand five hundred dollars ($46,500), being the principal of bonds issued as a temporary loan under the provisions of the Act of April 2, A.D. 1870, and which became due on the 1st day of January, A.D. 1877.

And whereas, It is made the duty of the Councils of the city of Pittsburgh, by the Act of Assembly in such case made and provided, to annually appropriate and apply out of the revenue of the said city, derivable from all sources, and before the payment of the salaries of the city officers, and before the payment of the ordinary current expenses of said city, sufficient moneys to the payment of the interest of the funded debt of said city.

And whereas, It is further made the duty of said Councils, by the twenty-second section of said Act of April 2, 1870, in case any interest should become due on said bonds, issued in pursuance of said Act, and there is no fund to pay the same, to make a temporary loan for the payment of the same.

And whereas, In disregard of their said duty, and notwithstanding the interest of said bonds remains in arrears and unpaid, the said Councils have failed to assign and appropriate out of the revenue of said city sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears, and have also failed to make a temporary loan for the purpose of paying the same.

And whereas, It is further the duty of said Councils to annually, in their appropriation ordinance, assign and appropriate sufficient money with which to pay the interest on the city funded debt, from time to time becoming due, and to provide such moneys by directing the assessment and collection of the necessary taxes.

And whereas, The said Councils, in disregard of their said duty, have failed to enact an appropriation ordinance containing any appropriation for interest accruing and to accrue on the bonds issued in pursuance of the said Act of 1870.

And whereas, By reason of the said wrongful neglect of the said Councils to make any provisions whatever for the payment of said interest, so accrued and accruing on said bonds, the said Henry Whelen and the other holders thereof have been unable to recover or receive the amount of interest now, and for a long time past, due and unpaid, although they have demanded and endeavored to procure the payment of the same.

And whereas, The holders of said bonds and the said Henry Whelen, one of said holders, cannot have adequate relief in the premises without the aid of a writ of mandamus:

We, therefore, being willing that due and speedy justice be done in this behalf, do command you, firmly enjoining that forthwith you make full and ample provision for the payment of all the interest now due on said bonds, and that which shall become due thereon in the year 1878, by the assessment and collection of such taxes as may be necessary for the purpose, and that you assign and appropriate, out of the revenue of said city of Pittsburgh, derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears and to become due, giving preference, if any deficiency should arise, to the payment of said interest before the payment of salaries of city officers and the ordinary current expenses of

said city; and that all and singular the matters for the speedy performance of the foregoing, according to the exigency of the law, you shall do and execute immediately, or the cause whereof you cannot do the same, you shall signify to us on or before the 19th day of February, A.D. 1878, at our Court, lest for your default further complaint shall come to us.

WITNESS, the Hon. Edwin H. Stowe, President Judge of our said Court of Common Pleas, No. 1, of Allegheny County, at Pittsburgh, the 16th day of February, A.D. 1878, and of the Commonwealth the one hundred and second.

B. F. KENNEDY,
Prothonotary.

Copy.
[Witness.]
R. H. FIFE, *Sheriff.*

On February , 1878, the Councils displaced the City Attorney in this case, by directing a Committee to employ special counsel to defend the city.

February 19, the Court agreed to postpone the day on which the Answer of the City Councils must be filed, to Saturday, March 2, 1878.

D. T. Watson and J. F. Slagle, Esqs., on behalf of the Councils of the city of Pittsburgh, filed an answer in the Court of Common Pleas, No. 1, on Saturday, March 2, 1878, to the aforesaid petition of Henry Whelen. Accompanying the names of the counsel attached to the petition are those of Messrs. Bigham, Wainwright, Lambie, McCandless, Duff, and Hayes, Councilmen. The Court fixed the 15th of March for the argument.

RETURN OF RESPONDENTS.

The several pleas and returns of the said members of the Select and Common Councils of the city of Pittsburgh.

True it is that, under the provisions of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh," approved the 2d day of April, A.D. 1870, and the supplements thereto, approved the 1st day of February, A.D. 1871, and the 20th day of March, A.D. 1872 (true copies of which said Act, and the supplements thereto, are herewith filed as part hereof), the grading, paving, and improvement of Penn Avenue and other streets and avenues in certain portions of the city of Pittsburgh, have been effected; and it is also true that, upon the requisition of the Commissioners elected under said recited Acts and the supplements thereto, for the said Penn Avenue and the other streets and avenues aforesaid, and for the purpose of providing for the payment of the cost and expense of the improvement of the said Penn

Avenue and other streets and avenues aforesaid, and in pursuance of the provisions of the said recited Acts of Assembly, and not otherwise, the Mayor of the city of Pittsburgh did affix to certain bonds the common corporate seal of the said city of Pittsburgh, and the said bonds were signed by the Mayor and Controller, and delivered to the Commissioners of the said respective streets and avenues, elected as aforesaid, including Penn Avenue. The said bonds so issued were in words and figures as follows, to wit:

REGISTERED BOND.

UNITED STATES OF AMERICA, STATE OF PENNSYLVANIA,

CITY OF PITTSBURGH.

No. $

ELLSWORTH AVENUE BOND.

Know all men by these presents:

That the city of Pittsburgh is indebted to .....

.....

or assigns, in the sum of.....

lawful money of the United States, which sum of.....

the said city of Pittsburgh.....promises to pay to the said

.....or assigns,

at the office of the Treasurer of said city, on the first day of April, one thousand eight hundred and eighty-five, with interest at the rate of seven per centum, payable semi-annually, on the first days of October and April of each year, and for the true and faithful payment of the said sum of.....and the semi-annual interest thereon as aforesaid, the faith, credit, and property of said city of Pittsburgh are hereby solemnly pledged.

This bond is issued for the Ellsworth Avenue Improvement, in pursuance of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the improvement of

Penn Avenue and other avenues and streets in the city of Pittsburgh," approved the 2d day of April, A.D. 1870, and supplements thereto, and an ordinance of the Councils of said city, adopted on the 9th day of December, 1872, authorizing the grading and paving of Ellsworth Avenue from Penn Avenue to Neville Street, and the election of Commissioners for that purpose. This bond transferable on the books of the Treasurer of said city, and not otherwise.

In witness whereof, the said city of Pittsburgh has caused this bond to be signed by the Mayor and countersigned by the Controller of said city, and the corporate seal to be hereunto affixed, this first day of April, A.D. one thousand eight hundred and seventy-three.

.....

Mayor.

.....

Controller.

Countersigned by

.....
.....
.....
.....
.....

Commissioners of Ellsworth Avenue Improvements.

And your respondents say that each and every bond issued by the Mayor and Controller as aforesaid for the said respective streets and avenues are, and were, exactly similar to the said recited bond, except that on each bond is the name of the street or avenue improved, and for which the said bond was issued, instead of the words "Ellsworth Avenue Bond," as in the copy given, and the names of the Commissioners written upon each bond are those of the Commissioners of the respective streets for which the said bond was issued, and on each bond is the date of the issue, date of the ordinance authorizing the improvement of the street or avenue aforesaid for which it is issued, the street or avenue or portions of the same to be improved, and the date of the payment of the said bonds and the interests thereon.

And these respondents further say, that the only authority for the

issue of the said bonds by the Mayor and Controller and their sale by the said Commissioners, was the provisions of said recited Acts of Assembly, and that are subject to the restrictions and limitations therein contained, and payable in the manner and by the means therein provided and described. It is true that the Commissioners of the said respective streets and avenues improved under the said recited Acts as aforesaid did sell and negotiate said bonds, but no portion of the moneys received from the sale of said bonds was paid to the city of Pittsburgh, nor did the said city of Pittsburgh apply any portion of the said moneys to the payment of the cost and expenses of the said improvement, but each commission appointed for each street and avenue in accordance with the provisions of said Act, received the proceeds of the sale of said bonds issued for the improvement of their said respective streets and avenues, and in accordance with the provisions of said recited Acts, placed the same with the Treasurer of the city of Pittsburgh, merely as a place of deposit, and the said moneys were paid out only upon the requisition of the said Commissioners for the improvement of the said respective streets and avenues for which the said bonds were issued. Said moneys for each and every street and avenue as aforesaid were kept separate and apart from each other, and from all funds of the city of Pittsburgh, and the city of Pittsburgh had no supervision or control over said funds, but the same were exclusively subject to the requisitions and demands of the said Commissioners. Your respondents aver that the said Henry Whelen and other owners of the said bonds, well knew all the facts hereinbefore stated, at and before they became the owners of said bonds or any one of the same. It is also true that many of the said bonds have been registered by the Treasurer of the city of Pittsburgh, under the provisions of the said recited Act of February 1, 1871, but it is not true that "the greater portion of the bonds have been presented by the holders thereof to the Treasurer of the city of Pittsburgh to be registered as part of the debt of said city, and have been by him registered accordingly."

It is true that Henry Whelen is the holder and owner of bonds numbered 85, 107, 108, 349, 352, 350, 351, 341, 344, 357, 324, and 336, and is agent for other parties holding large amounts of said bonds, but these respondents say that each and every one of said bonds so owned and hold was issued in form and manner as hereinbefore

described, and under the provisions of the said recited Acts of Assembly, and under no other power or authority whatever, and for no other purposes than as hereinbefore stated. It is true that there is now overdue and unpaid of interest for the year 1877, on the said bonds, issued as aforesaid, a large sum of money, to wit: the sum of three hundred and ninety-eight thousand five hundred and fourteen dollars ($398,514), and that a larger sum will fall due during the year 1878; and it is also true that, on account of the temporary loan made by the city of Pittsburgh, under the provisions of Section 22 of the said recited Act of April 2, A.D. 1870, there is now due the sum of forty-six thousand five hundred dollars ($46,500); but respondents aver that the said Henry Whelen, and those for whom he acts, are in no manner interested in said last-mentioned sum of forty-six thousand five hundred dollars ($46,500) or any portion thereof. It is true that it is made the duty of the Councils of the city of Pittsburgh, by Act of Assembly in such case made and provided, to annually appropriate and apply out of the revenues of said city, derivable from all sources, and before the payment of the salaries of the city officers, and before the payment of the ordinary current expenses of said city, sufficient moneys for the payment of the interest of the funded debt of said city; and that it is further the duty of said Councils to annually, in their appropriation ordinance, assign and appropriate sufficient money with which to pay the interest on the city funded debt, from time to time becoming due, and to provide said money by directing the assessment and collection of the necessary taxes; but they deny that any of the bonds held by the said Henry Whelen and others for whom he acts in this case, are a part of the funded debt of the city of Pittsburgh; and they deny that they have in any manner disregarded their duty, or have failed to assign and appropriate out of the revenues of said city sufficient moneys for the payment of the interest of the funded debt of said city; but, on the contrary, aver that they have made ample provision for the same, in and by an ordinance duly adopted on the 24th day of February, A.D. 1878, in and by which there is appropriated for the payment of interest on said funded debt the sum of four hundred and eighty-six thousand seven hundred and seventy-five dollars ($486,775) interest accrued and to accrue during the fiscal year, amounting to the sum of four hundred and eighty-six thousand seven hundred and seventy-five dollars and no more. It is true that in and

by this twenty-second section of the Act of April 2, A.D. 1870, hereinbefore recited, Councils of the said city of Pittsburgh are authorized, in case any interest should become due on bonds issued in pursuance of said Act, when there is no fund to pay the same, to make a temporary loan for the payment thereof; but respondents deny that in and by said Act of Assembly it is made the duty of Councils to make a temporary loan for such purpose.

It is true that respondents have failed to enact an appropriation ordinance containing any appropriation for interest accruing and to accrue on bonds issued in pursuance of said Act of 1870; but respondents deny that they have, in any respect, disregarded their duty, or that by any wrongful neglect of Councils said Henry Whelen and others, holders of said bonds, have been unable to recover or receive the interest due thereon.

And for further plea and return in this behalf, respondents say that in the year 1857, under the provisions of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "an Act supplementary to an Act to incorporate the city of Pittsburgh," approved the 16th day of May, A.D. 1857, the cost and expense of the streets theretofore graded and paved in said city of Pittsburgh, and paid for by said city, was assessed upon the property abutting thereon, by an equal assessment per foot front, and thereafter all streets in said city were graded, paved, and improved solely upon the faith and credit of the property abutting upon each street and avenue improved, and without expense to the said city, and prior to the said Act of April 2, 1870, the cost and expense of all streets and avenues of the said city of Pittsburgh, which had been graded, paved, and improved, was paid by assessment upon the property abutting on each of the said streets or avenues, in accordance with the Acts of Assembly relating thereto, and without expense to the city of Pittsburgh. That, prior to the passage of the Act hereinafter referred to as the Act of April 6, A.D. 1867, the corporate limits of the city of Pittsburgh comprised the territory now included within the first twelve wards of the city of Pittsburgh as it now exists. In the year A.D. 1867, under the provisions of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "A further supplement to the Act incorporating the city of Pittsburgh, extending its boundaries," etc., approved April 6, A.D. 1867, the corporate limits of said city of Pittsburgh were

extended, and large portions of adjacent territory were added to, and made part of, said city, the said annexed territory comprising that portion of the city now included within the wards numbered from thirteen to twenty-three, inclusive; and in and by said Act of April 6, A.D. 1867, and the supplement thereto, approved April 1, A.D. 1868, the laws then in force relating to the grading and paving and improving the streets in said city were extended to the portions of territory so annexed, and by reason thereof the property in said annexed districts became liable to pay for grading, paving, and improving the streets and avenues in said districts by assessment upon the property abutting on each of said streets and avenues without expense to the city of Pittsburgh. The owners of property situated in the territory so annexed to the said city of Pittsburgh were desirous of procuring the grading, paving, and improving of various streets and avenues in and through said adjacent territory, and to have the control of the work, and to provide for the payment of the cost thereof, by assessments on the property abutting thereon, payable in annual instalments, and for that purpose procured the passage of the said recited Act of April 2, A.D. 1870, and under and in accordance with the provisions of said Act of April 2, A.D. 1870, Penn Avenue and various other streets and avenues within the said annexed portions of territory were graded, paved, and improved, and bonds as aforesaid under the provisions of the said recited Act of April 2, A.D. 1870, and constituting a portion of the bonds mentioned in the writ of mandamus aforesaid, were issued to pay for the improvement of the same, the principal of said bonds amounting to the sum of four million four hundred and thirty-six thousand nine hundred dollars ($4,436,900).

In accordance with the provisions of the said recited Act of April 2, A.D. 1870, and the said supplements thereto, the cost and expense of the said grading and paving and improving of the said streets and avenues in said annexed district in each and every instance was ascertained and fixed by the Commissioners of the said respective streets or avenues upon the completion of each street and avenue, by ascertaining the entire amount of the said recited bonds issued for the improvement of the said recited streets or avenues, and sold by said Commissioners, and by adding thereto interest on the same to the 1st day of October preceding the completion of the said improvement, and that said total cost thus ascertained was assessed upon the property fronting or abut-

ting on said respective streets and avenues thus improved, in accordance with the provisions of said recited Act. That the Commissioners of each and every of said streets and avenues, for which the said bonds as aforesaid was issued, caused a plot or plan of said respective streets or avenues to be prepared showing the separate lots of ground abutting on said respective streets or avenues and the names of the several owners of the said respective lots, and said Commissioners did also make for every street and avenue as aforesaid a schedule or list of names of all of said owners and the amount assessed against each lot, and the said Commissioners then gave ten days' public notice, by advertisements in three daily newspapers of the city of Pittsburgh, and by handbills posted in conspicuous places on the line of each of said streets and avenues, of the time and place where, for the period of twenty days thereafter, the said plan or schedule, or either or both of the same could be corrected. That at the end of said twenty days the said Commissioners did correct all errors made known to them either in said schedule or plan, and thereupon did file the said schedules and plans in the office of the Prothonotary of Allegheny County, and did also deliver a copy of the said plots or plans and schedules to the Treasurer of the city of Pittsburgh, and the said schedules and plans filed in said office of the Prothonotary as aforesaid were in each case accompanied with the advertisements relating thereto, with the names and the dates of the papers in which the said advertisements were published, and the said plots or plans and schedules were attested by the Commissioners of the said respective streets and avenues, and the said plots or plans, schedules, and advertisements with reference to each and every of the said streets and avenues were filed in said Prothonotary's office, and were respectively copied into the municipal lien docket of the city of Pittsburgh, in said office. The said advertisements, plans, or plots, and schedules were duly and regularly, and in accordance with the provisions of the said recited Act of April 2, A.D. 1870, and the said supplements thereto, made and filed for each and every avenue, and for the entire amount of the said recited bonds as aforesaid for said respective streets or avenues, with the interest thereon, as aforesaid; and the aggregate of said assessments on all of said streets and avenues in said annexed district exceeds the amount of four million four hundred and thirty-six thousand nine hundred dollars ($4,436,900). That all of said assessments, plans, and schedules had been duly filed

as aforesaid, in accordance with the provisions of the said recited Act of April 2, A.D. 1870, and the said supplements thereto, long prior to the 16th day of February A.D. 1878, and the said assessments then were, and for long time prior thereto had been, liens against the property abutting on said respective streets and avenues in said annexed district, for the improvement of which said streets and avenues the said recited bonds as aforesaid had been issued. That said assessments are payable in ten equal annual instalments, from the 1st day of October preceding the filing as aforesaid of the said plans and schedules of the said respective streets and avenues, with interest thereon at the rate of seven per centum per annum, and that ample provisions are made by the terms of said Act of April 2, A.D. 1870, and the said supplements thereto for the collection of the said assessments. That the assessments for the said respective streets and avenues respectively mature and are due prior to the maturity of the said bonds issued for each street and avenue.

That the grading, paving, and improvement of many of the streets and avenues in said annexed district had commenced prior to the 2d day of April, A.D. 1872, and that the bonds as aforesaid issued for the improvement of the said last-mentioned streets and avenues amount to the sum of eight hundred and eighty-two thousand four hundred dollars ($882,400), and bear date prior to April 2, 1872.

There was due on January 1, A.D. 1877, of the said assessment and the interest thereon a large sum of money exceeding in amount the sum of one million dollars ($1,000,000), and much more than sufficient to pay all the interest now due on said bonds, and there is now due of said assessments and the interest thereon the sum aforesaid, and more than sufficient to pay all the interest which will fall due on the said bonds in the year A.D. 1878. That the said assessments are ample and sufficient for the payment of all the interest now due or to fall due on the said bonds, and are under said recited Act of Assembly of April 2, 1870, and the said supplements thereto, especially appropriated to and made the means of the payment of the interest on the said recited bonds.

That in the year A.D. 1872, by virtue of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "A supplement to the several Acts incorporating the city of Pittsburgh, enlarging its boundaries," etc., approved the 2d day of April, A.D. 1872, the

boroughs of Temperanceville, Union, Allentown, Mt. Washington, Birmingham, East Birmingham, Monongahela, Ormsby, South Pittsburgh, St. Clair, and West Pittsburgh, were annexed to said city of Pittsburgh on the 1st Monday of November, A.D. 1872, which said last annexed territory comprises the wards of the city as it now exists, from numbers twenty-four to thirty-six, both inclusive. That all of said last annexed territory had paid for the streets and avenues therein comprised. That subsequent to the annexation of the said last-described territory, and within the boundaries and limits of the same, in accordance with the provisions of the said recited Act of April 2, A.D. 1870, there were improved the following streets and avenues: Brownsville and Washington Avenues, Carson Street, Main Street, Chestnut Street, and Jane Street, for the improvement of all of which there was issued under the provisions of the recited Act of April 2, A.D. 1870, bonds as aforesaid to the amount of $617,300. That the improvement of said streets and avenues is not yet completed, but assessments in accordance with the provisions of the said recited Act of April 2, A.D. 1870, and the supplements thereto, will be made by the Commissioners of the said respective streets and avenues; for the total amount of the bonds, with the interest thereon, as provided by said Act, and said assessments, will be ample and sufficient to pay all of said bonds and the interest now due upon the same.

That the power of collecting all of said assessments made under the provisions of the said recited Act of April 2, A.D. 1870, and the supplements thereto, as appears in and by the terms of the said recited Act of April 2, A.D. 1870, and said supplements thereto, is committed to the Treasurer and Attorney of the said city of Pittsburgh, and your respondents have no power or authority in the premises, but respondents state that, desiring to provide out of the said assessments means for the payment of the interest on the said recited bonds, they have requested the City Attorney and the City Treasurer to speedily proceed with and collect all the instalments and money now due on said assessments. And these respondents further aver and state that in truth and in fact each and every one of the said respective bonds were issued and sold solely on the faith and credit of the said assessments made or to be made upon the abutting property on each street and avenue improved or to be improved, as aforesaid, under the said recited Act of April 2, A.D. 1870, and the said supplements thereto, and that

the provisions of the said Act of April 2, A.D. 1870, and the supplements thereto, were the sole and only authority for issuing the same, and that with full notice and knowledge of all the said recited facts, the said Henry Whelen and those for whom he acted purchased said bonds, and at and before the time the said respective bonds were purchased by the said Henry Whelen and others for whom he acted, the said Henry Whelen and others had notice and knowledge of each and every street and avenue for the improvement of which the said respective bonds were issued, and that the said Henry Whelen and those for whom he acted had full opportunity to examine all the said streets and avenues and the properties abutting thereon prior to the time they purchased any one of the said bonds. And the said Henry Whelen and those for whom he acted had full notice and knowledge that the property abutting on the streets and avenues of the city of Pittsburgh as it existed prior to the year A.D. 1867 had paid for the cost and expense of the grading, paving, and improvement of the streets within its boundaries, and also with full knowledge on their part that under the provisions of the said recited Act of April 2, A.D. 1870, and the said supplements thereto, the cost of the grading, paving, and improving of the several streets and avenues to be graded and paved thereunder was to be paid for solely by assessments on the property abutting on the said respective streets and avenues so as to be graded, paved, and improved.

And your respondents further state and aver that during the progress of the improvement of Washington and Brownsville Avenues as aforesaid, and on Highland Avenue No. 1, and Stanton Avenue, the two latter of which streets and avenues were in the territory annexed under the said recited Act of April 6, A.D. 1867, the Mayor of the said city of Pittsburgh refused to issue bonds as aforesaid under the corporate seal of the said city of Pittsburgh under the provisions of the said recited Act of April 2, A D. 1870, although the Commissioners of the said respective streets had made requisitions and demands therefor, whereupon the Commissioners of the said respective streets applied to your Honorable Court, and by proceedings in said Court applied for writs of mandamus commanding and enjoining the said Mayor to issue the said bonds as aforesaid, and such proceedings were had therein under the said recited causes that your Honorable Court did issue writs of mandamus to the Mayor of the city and com-

pelled him to issue bonds as aforesaid for the said respective streets and avenues to the amount of $50,000, and that the same are part of the bonds enumerated and referred to in the writ of mandamus in this case, and to the proceedings and record of each of said causes your respondents beg leave to refer.

And respondents further aver that the only portion of any street or avenue improved under the said recited Act of April 2, A.D. 1870, which lay within the corporate limits of the city of Pittsburgh, as it existed prior to the year A.D. 1867, was a small portion of Forbes Street No. 2, and that the bonds as aforesaid issued to pay for said portion so improved do not exceed in the aggregate the sum of $30,000.

And for a further answer and plea in this behalf, these respondents say that the debt of the city of Pittsburgh on the 1st day of January, A.D. 1874, was $7,527,300, and that the assessed value of the taxable property in said city of Pittsburgh on January 1, A.D. 1874, was $19,614,975, and that on January 1, A.D. 1874, the amount of bonds as aforesaid, issued as aforesaid, under the said recited Act of April 2, A.D. 1870, was $2,134,600, and adding the said outstanding indebtedness of the said city, and the said recited bonds would amount to $9,661,900. That during the year 1874, with the same assessed value of the taxable property in said city, the said Mayor and Controller issued as aforesaid, solely under the authority of the said recited act of April 2, A.D. 1870, bonds as aforesaid amounting to $2,519,100 additional, making outstanding of bonds issued under the said Act of April 2, A.D. 1870, $4,653,700. And respondents aver that each and all of said recited bonds, each and every one of which are included within the amount of bonds named in the writ of mandamus, were issued by the Mayor and Controller of the said city of Pittsburgh solely and only, under and by virtue of the power and authority contained in the said recited Act of April 2, A.D. 1870, and without any other or further power or authority, and that each and all of the same were so issued without the assent of the electors of said city.

And for a further answer and plea, these respondents say that since January 1, A.D. 1874, there was issued by the said Mayor and Controller, under and by virtue of the said named Act of April 2, A.D. 1870, and by no other power or authority whatever, $3,689,200 of the bonds aforesaid included in the sum of $5,823,800 named in the said

writ of mandamus. That each and all of the same were issued on requisitions and demands of the respective Commissioners elected for the said streets and avenues, and that no appropriation was made for the said bonds previous to the issue of the same by the said city of Pittsburgh, but the same were respectively issued on the faith and credit of the assessments to be made under said recited Act of April 2, A.D. 1870, and the said supplements thereto.

By reason whereof and of the said enumerated facts your respondents submit that they show sufficient cause why a writ of mandamus should not issue against them, and that the relator, Henry Whelen, and those for whom he acts, are not entitled to a writ of mandamus against these respondents, to compel and enjoin them to make any other or further provision for the payment of the interest on said bonds than has already been made. And your respondents pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

DEMURRER.

Mr. Henry Whelen, through his counsel, Messrs. Acheson and Shiras, on March 13, 1878, filed a demurrer to the answer of the City Councils, claiming that it was insufficient, and that a peremptory mandamus should issue. The reasons set forth in the demurrer are as follows:

First. That the said return does not set forth and show any cause why the respondents should not appropriate, out of the sums raised and to be raised by taxation, a sum sufficient to meet the interest accrued and to accrue on the bonds issued in pursuance of the Act of April 2, 1870, and supplements, in pursuance of the requisition set out in the said writ.

Second. That the said return does not show any cause why a *mandamus* should not issue against the respondents, to compel them to forthwith make such appropriation.

Third. That the said return does not show why a writ of mandamus should not issue against the said defendants to compel them forthwith to levy a tax to raise a sum sufficient to meet and pay the interest accrued heretofore and to accrue during the year 1878.

Fourth. Because the said return does not show any cause why the said writ of mandamus should not issue as prayed for at the suggestion of this relator.

For these and other reasons the relator demurs, and prays the judgment of the Court whether the said return is sufficient in law to excuse the respondents from making the appropriation, and asks that a writ of peremptory mandamus be awarded, commanding them forthwith to proceed by ordinance to appropriate sufficient moneys for the payment of the interest.

DECISION

BY THE

SUPREME COURT

OF PENNSYLVANIA

IN THE

PENN AVENUE BOND CASE,

RENDERED AT PITTSBURGH, NOVEMBER 18, 1878.

THE OPINION WAS READ BY JUDGE PAXSON.

The Commonwealth of Pennsylvania *ex relatione* Henry Whelen *vs.* the Select and Common Councils of the City of Pittsburgh. Error to the Common Pleas No. 1, of Allegheny County.

Paxson J. The Act of 2d April, 1870, entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the City of Pittsburgh" [P. L. 796], bears upon its face the evidence that the Legislature intended a system by which the city of Pittsburgh should be enabled to extend its streets and avenues from time to time as required for its convenience or pleasure. The immediate occasion of the passage of the Act was probably the large extension of the city limits by the Act of 1867. Said extension embraces a considerable amount of strictly rural territory, used and cultivated for the most part as farm lands. It was considered desirable, during a period of inflation and in the midst of expanding values, to open broad avenues for miles through these farms, to grade down hills, fill up ravines, and curb and pave the avenues in a costly manner. The Penn Avenue Act

may be regarded as the result of this condition of things. We will not stop to discuss its wisdom. It is enough to say that it was passed with all the forms necessary to a legal enactment, and its twenty-fifth section provides that said Act should not take effect "until the Councils of the City of Pittsburgh shall have approved thereof." The City Councils having approved of it, and proceeded to act under it in the opening of its avenues, the city must be held to the full measure of its legal responsibility therefor.

Without going into unnecessary detail, the principal features of the Act are those providing for the election of Commissioners by the owners of property abutting on the streets to be improved, whose duty it is declared to be to control and superintend the grading, curbing, and paving; the payment of the cost of the work from the proceeds of the sales of bonds of the city; the assessment of the cost upon the abutting property, which was made payable in ten equal annual instalments with seven per cent. interest, thereby creating a fund to be applied under the direction of the Finance Committee of Councils to the payment of the interest on and the redemption of the bonds. Under the system thus briefly sketched, Penn Avenue and several other streets and avenues have been graded and paved, and bonds of the city amounting to over $5,000,000 have been sold in the market, the proceeds paid into the city treasury, and drawn out upon the orders of the Commissioners in payment of the cost of the improvements referred to. For several years the city paid the interest upon these bonds with promptness, but defaulted for the year 1877, and has paid no interest since.

The relator, Henry Whelen, is the owner of $9500 of these bonds, and is the agent of several corporations and individuals who are large holders of the same. In February, 1878, he presented his petition to the court below, praying the said court to award a writ of alternative mandamus commanding the Councils of said city to show cause why they should not provide for the payment of the interest. To the writ thus granted a majority of the Councils made a return denying the liability of the city upon the bonds. The relator filed a demurrer to the return. The President Judge of the court below, being the owner of some of the bonds, declined for that reason to sit at the hearing. The remaining two judges differed in opinion. In order, however, that the case might be brought to this court, they entered judgment

for the defendant, and refused the writ of peremptory mandamus. To the judgment thus entered this writ of error was taken.

That the writ of mandamus is a proper and appropriate remedy in such cases is settled law. [Here a number of authorities were cited.] The relator having selected his proper remedy, it remains to be seen whether he has shown such a case as entitles him to the writ. That the facts set forth in his petition establish a *prima facie* case is too clear for argument, and must prevail, unless the defendants have set out such matters in their return as relieve them from responsibility.

We need not go over in detail the grounds of defence specified in the return. They may be reduced to two heads:

First, That the bonds issued under the Act of April 2, 1870 (Penn Avenue Act), and its supplements do not constitute part of the funded debt of the city of Pittsburgh; that the holders of such bonds are bound to look for the payment of the interest thereon, and to become due, to the assessments made under the provisions of said Act upon the properties abutting upon the streets and avenues improved; and that no authority or power has been given or delegated to the Councils of the city to levy a general tax, or any tax, to pay the interest on said bonds, or to apply any moneys out of the general resources of the city for that purpose.

Second, That the bonds in question were issued in disregard of that provision of the Constitution which limits the debt of the city; and on the requisition of Commissioners, without any previous appropriation made for their payment by Councils, as required by the Constitution.

We will consider these propositions in the order in which they are stated.

The first material question is, Are the bonds in controversy the bonds of the city of Pittsburgh, and for which the city is directly liable to the holders for the payment of both principal and interest? That they are so in form is manifest. They purport to be the bonds of the city, signed by the Mayor and Controller, countersigned by the Penn Avenue Commissioners, and have the corporate seal affixed. And for the true and faithful payment of the sum of money mentioned in each bond, and the semi-annual interest thereon as aforesaid, "the faith, credit, and property of the city of Pittsburgh" are therein solemnly pledged. So that if the bonds were issued by authority of law,

upon a sufficient consideration, there could be no doubt but that they are the bonds of the city. No question has been made as to the consideration. It is not denied that the holders paid par for them in good money, and that the proceeds went into the city treasury. Were they issued in pursuance of law? It is admitted that they were issued under section twelve of the Penn Avenue Act, which section is as follows: "For the purpose of providing for the payment of the costs and expenses of said improvements, the said Commissioners shall be authorized from time to time, as the work progresses, to make requisition upon the Mayor of the city of Pittsburgh for the issue of bonds of said city, in such sums as they may deem best; and it shall be the duty of the said Mayor to make and execute bonds in the name of said city, to an amount not exceeding the amount of the contract price for said work, and the incidental expenses attending the same; said bonds shall be known as Penn Avenue bonds; they shall be signed by the Mayor, and countersigned by the Controller, and sealed with the corporate seal of said city; they shall be all of the same date, and they shall be payable twelve years after date, and redeemable at any time at the option of said city; they shall bear interest at the rate of seven per centum per annum, payable semi-annually from date, principal and interest payable at the office of the Treasurer of the city of Pittsburgh; and said bonds shall be free from taxation."

Every street or avenue improved under the Penn Avenue Act, and its supplements, were so improved by virtue of an ordinance of City Councils, directing the grading and paving thereof in accordance with the provisions of said Acts, and authorizing the election of Commissioners by the owners of the abutting properties. Each bond issued by the city has a recital of the ordinance authorizing the improvement of the street or avenue for which it was issued. The contract for each improvement was made in the name of the city, and the security for the faithful performance of the work was in each instance given to the city.

Here, then, we have the case of bonds issued in the name and under the corporate seal of the city, the proceeds of which went into the city treasury, and were drawn out upon orders for the payment of the debts of the city lawfully contracted in the course of its municipal improvements. That all this was done through the interposition of commissions amounts to nothing. That such commissions, created by

the Legislature, may lawfully bind a municipality was expressly ruled in the City of Philadelphia *vs.* Field, 8 P. F. S., 320. But these commissions, if not created by the direct action of the City Councils, were certainly raised up with their consent. We need not argue that a municipal corporation may give its bond or other evidence of indebtedness for a debt lawfully contracted in the proper performance of its municipal duties. That question is settled by Commonwealth *ex rel.* Reinboth *vs.* the Councils of the City of Pittsburgh, 5 Wright, 278; City of Williamsport *vs.* the Commonwealth *ex rel.* Bair, 3 Norris, 487.

It was urged, however, that notwithstanding the fact that the bonds were issued by the city, and upon their face pledge the faith and credit of the city for their payment, yet that the holders must look for the payment of their interest to the street assessments upon the properties abutting upon the avenues. There is nothing in the case to indicate that such was the understanding or agreement of the parties at the time the bonds were sold. On the other hand there are persuasive reasons to show that it was not. These bonds were sold at par. The fourteenth section of the Act of 2d of April, 1870, required that they should be sold at not less than par. That they could have been disposed of at par, or indeed for any considerable sum, had it been known that the holders were to look for payment to the municipal assessments upon abutting property, is a proposition too absurd for discussion. It is not alleged that the city at any time, or at any place, gave notice to anybody that these bonds, though issued over her corporate seal, were payable out of street assessments. It is true each bond contained the statement that it was issued for the improvement of a certain avenue, in pursuance of the before recited Act of 2d of April, 1870. It is conceded that the bondholders are bound by the terms of that Act, for the reason that it is the authority upon which the bonds were issued. But I have looked in vain through the Act for anything to show even a glimmering of legislative intent that the bondholder should look to the street assessments for his pay. Such a provision, if apparent upon the face of the Act, must necessarily have rendered it wholly abortive. The whole plan depended upon the ability of the city to borrow the necessary amount of money. In construing this Act, therefore, we are not to assume that the Legislature intended to do that which would entirely defeat the object of the Act

itself. We do not regard it, however, of doubtful interpretation. It clearly makes the city responsible. By the 12th section, as well as by the express terms of the bonds themselves, the city is to pay the interest semi-annually from the date of the bonds, whereas by the 18th section the first instalments of the assessments are not payable until the first day of October succeeding the time of the assessment. By section 16 the assessment is not to be made until after the improvement is completed, and the basis for the assessment is the amount of the bonds previously sold. By section 22 it is provided that "all moneys received from assessments shall be appropriated, under the direction of the Finance Committee of Councils of the city of Pittsburgh, to the payment of the interest and the redemption of the bonds which may be issued for said improvement; if any interest shall become due on said bonds, when there is no fund from which to pay the same, the Councils of the city of Pittsburgh shall be authorized to make a temporary loan for the purpose of paying the same." Surely it was never heard that an Act of Assembly authorized the Councils of a city to make a temporary loan to enable them to pay money which the city did not owe. An examination of these sections, as well as the entire scope of the Act, leads us irresistibly to the conclusion that the Legislature did not intend that the bondholders should depend for the payment of their interest upon the street assessments. Had such been the intention of the Legislature it would have been expressly so provided. Good faith to the bondholders required that they should have been told so in explicit terms.

The system of municipal assessments is not new. It has been in use for a long time, and is well understood. Streets are being constantly paved and sewers constructed, the cost of which is by authority of the Legislature assessed upon the abutting property. Yet it has never been held that the city contracting for such work can turn the contractor over to the property owner for his pay, unless he agrees to look to them for payment. The plain object of the provision in the Penn Avenue Act for the assessment of the cost of the street improvements upon the abutting properties was to provide a fund out of which the city should be reimbursed in whole or in part for the outlay. The bondholders have nothing to do with it. They have no contract relation with the property owners as such, nor have they any right to enforce the payment of the assessments.

If the bonds in question are bonds of the city, then the duty of the City Councils to include the interest as it accrues in the annual appropriation ordinance, and to provide for its payment by a levy of sufficient taxes, is clear. Section 3 of the Act of 6th of April, 1850 [P. L. 507], makes it the duty of Councils to assign and appropriate the revenues of said city derivable from all sources, and in case of a deficiency, preference shall be given to the payment of the interest on the funded debt of the city. The Act of April 15, 1867 [P. L. 1258], removes all limitations and restrictions contained in prior Acts of Assembly, upon the power of the city to raise money by a tax levy to pay the interest upon the city debt and for other city purposes; while the tax-rate is to be adjusted so as to meet the liabilities of the city. The second section of the Act of March 19, 1873 [P. L. 317], provides "that the Councils of the said City of Pittsburgh shall hereafter make the appropriations during the month of January or February in each and every year, in the manner prescribed by the said Act of April 6, 1850." This Act (19th of March, 1873) was after the Penn Avenue legislation, and after the issue of the bonds thereunder had commenced.

A further objection was made to the bonds that they were issued in violation of Article 9, Section 8 of the Constitution, limiting the debt of municipal corporations. It is a sufficient answer to this to say that the section of the Constitution referred to does not apply. It is prospective in its operation. The same remark may be made in regard to the further objection that the bonds were issued without any previous appropriation made for the payment by Councils, as required by the present Constitution. It appears from the return that $2,134,600 of the bonds were issued prior to the 1st of January, 1874. The remainder were issued after that date. But we gather from the record that the contracts for the improvements for which the latter bonds were issued were entered into prior to June 1, 1874. It was the contracts that increased the debt of the city. The issuing of the bonds to raise money to pay the liabilities of the city under the contracts was but the exchanging of one form of indebtedness for another. That the sections in the Constitution invoked by the defendants do not apply to their case we think is settled by the Lehigh Iron Co. *vs.* Lower Macungie Township, 31 P. F. S., 432; Watson *vs.* Chesapeake & Delaware Railroad Co., 2 Norris, 254; Indiana County *vs.* Agricultural Society, 4 W. N., 481; Perkins *et al. vs.* Stack, 5 *id.*, 153.

We are all of opinion that the bonds in controversy are the bonds of the city of Pittsburgh, and a part of its debt; that they were issued by lawful authority and for a sufficient consideration, and that honor, good faith, and the law of the land alike require that the city should provide for their payment.

The judgment is reversed and judgment is now entered for the relator upon the demurrer; and it is further ordered that a writ of peremptory mandamus issue to the Select and Common Councils of the city of Pittsburgh, commanding said Councils to forthwith make full and ample provision for the payment of all interest now due on said bonds, and the interest as it shall become due; and further commanding the said Councils to assign and appropriate out of the revenue of the said city, derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears, and to become due, giving preference, if any deficiency should arise, to the payment of said interest before the payment of salaries of city officers and the ordinary current expenses of the city.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1878.

THE UNITED STATES EX REL., ALFRED HUIDEKOPER,
PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY.

No. 98.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

JAMES CARR and
W. P. HALL,
Of Counsel for Defendant in Error.

JEFFERSON CITY:
CARTER & REGAN, PRINTERS AND BINDERS.
1878.

—IN THE—

Supreme Court of the United States.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

The defendant in error makes the following points in the above cause, and relies upon the following authorities to sustain the judgment of the court below, viz:

I.

The coupons upon which the relator's judgment was rendered, and the bonds from which they were detached, were issued in payment of a subscription of $175,000 to the Missouri and Mississippi

Railroad Company on the 12th day of April, 1870, made under and by authority of the following clause in the charter of that company, viz: "It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year." (Session acts of 1865, p. 86.) This subscription was made solely under the authority of the charter, and it was the *second* subscription made by Macon county court to the Missouri and Mississippi Railroad Company. There had been a subscription of $175,000, made on the 2nd day of April, 1867, under and by authority of the charter alone. After the first subscription was made, the county court, owing to the great unpopularity of it, refused to issue the bonds, and was compelled to do so by mandamus from the Supreme Court of the State.

State ex rel the Missouri and Mississippi Railroad Company vs. Macon County Court, 41 Mo., 453.

II.

The following words in the 13th section of the charter, viz: "And levy a tax to pay the same *not to exceed one-twentieth of one per cent.* upon the assessed value of the taxable property for each year," were a *limitation* upon the power of the county court to levy a tax; and "this limitation was enacted not for the bondholders, but for the benefit of the tax-payers, so that they might not be harassed with a railroad tax, in any one year, too grievous to be borne."

State ex rel Aull and Pollard vs. Shortridge, et al., 56 Mo., 126.

United States vs. County of Clark, 95 U. S., 769.

III.

Said clause was not designed to create a sinking fund for the gradual extinction of the bonds in the sense claimed by the relator. It conferred *all the authority* which was intended to be conferred on, or vested in, the county court to levy a tax to pay for bonds issued under and by authority of said charter. It was held by the Supreme Court of the State construing this charter, in the case of the State ex rel the M. & M. R. R. Co. vs. Macon County Court, *supra*, that the assent of two-thirds of the qualified voters of the county, as required by the 14th section of XIth article of the Constitution, and

the 17th section of the IId article of the 37th chapter of Wagner's Statutes, was not necessary. Whatever rights the relator has in the premises are conferred by this clause in the charter, and he must cling to it alone as the sheet anchor of his safety, and stand by it or fall with it as the law shall determine.

"The only taxes that can be levied by counties are such as are provided for by statute. The power of taxation is a sovereign right, which can only be exercised in pursuance of laws passed by the Legislature for that purpose. There can be no such thing as an implied power in a county court to levy a tax. The power must be clearly and expressly given by statute. We are called upon to compel the county court of Macon county, by mandamus, to do what the law does not authorize, but expressly prohibits."

State vs. Shortridge, *supra*.

As the subscription in question was not made under or by authority of the General Statutes in force at the time of the adoption of this charter, then the 31st section of the statute in regard to Railroad Corporations, (Rev. Statutes, 1855, p. 427,) does not apply to this case for three reasons, viz: *First.* The subscription was not made under said statute. *Second.* No election was held as required by the 30th section of said act, so as to authorize the county court to make the subscription. (Leavenworth and Des Moines R. R. Co. vs. Platte County Court, 42 Mo., p.171.) *Third.* The Supreme Court of the State has construed the section of the charter under consideration, and decided that no other or greater tax than one-twentieth of one per cent. can be levied in one year to pay these bonds.

State vs. Shortridge, 56 Mo., 126.

State vs. Walker, p. 390, Vol. 7, Central Law Journal.

United States vs. County of Clark, 95 U. S., 769.

It never was intended to vest in, or leave it to, the discretion of three *irresponsible* county court justices to subscribe as often and as much as they might deem expedient, without the assent of a majority of the *tax-payers*, under the General Statutes in force when this charter was granted, and the assent of two-thirds of the qualified voters of the county, as required when this subscription was made. Three county court justices, or a majority thereof, could be bribed to make a subscription when *two-thirds* of the qualified voters, or *majority* of the tax-payers, of the county could not.

IV.

There was no contemporaneous exposition of this charter, nor any exposition at any time by any court, which ever construed it as authorizing the county court to levy any other or greater tax than "one-twentieth of one per cent. upon the assessed value of taxable property for each year."

State vs. Shortridge, *supra.*

State vs. Walker, *supra.*

Supervisors of Carroll vs. United States, 18 Wall., 77.

The fact that a tax of one-twentieth of one per cent. is inadequate to raise money enough to pay the bonds in question will not authorize this or any other court, in the language of Judge Scott, in the case of Pettis county vs. Kingsbury, (17 Mo., 479,) "by a kind of judicial midwifery to deliver the statute of an interpretation," which would confer upon the plaintiffs in error, as Justices of Macon County Court, a power which the Supreme Court of the State has repeatedly and uniformly held, that it did not possess, and, under the law, could not exercise.

Now if it shall be held, that the plaintiffs in error have power or authority to ignore the limitation of one-twentieth of one per cent. in levying a tax to pay these bonds, then said section, in the language of Chief Justice Sherwood in delivering the opinion of the court in the case of State ex rel Wilson vs. Garroutte, (7 Central Law Journal, p. 29,) is "simply a Legislative abortion."

V.

Statutes in derogation of common right, and charters of incorporation are always *strictly* construed; and if there is any *doubt* about the power conferred, that doubt is always resolved against the power claimed under the charter and in favor of the public.

Pennsylvania R. R. Co. vs. Canal Co., 20 Pa., 9.

Bailey vs. Maguire, 22 Wall., 215.

Rice vs. Railroad Co., 1 Black, 580.

The rules for the interpretation of statutes laid down in the brief of the plaintiff in error, are only designed as *aids* in arriving at the true intent and meaning of the Legislature. They are not meant to construe a statute as meaning something which is entirely different

from the plain and obvious meaning conveyed by the words of the statute.

Sec. 6, p. 887, Wag. Statutes.

VI.

Notice was given by the charter, and the bonds issued under and by authority thereof, that there was a *limitation* upon the power of the county court to "levy a tax to pay the same, *not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.*"

The tax book showing the assessed value of the taxable property of Macon county for 1867, and every year since then, is a public record in the office of the clerk of the county court of said county, and also in the office of the Auditor of the State of Missouri, to which the relator, or any other person desiring to purchase any of the bonds issued by that county, could have referred and ascertained to the *cent* the assessed value of the taxable property of the county, and on the data thus given made a calculation, and found out how much money the tax thus authorized to be levied would raise for the payment of the bonds issued in payment of the two subscriptions to the M. & M. R. R. Co.

The county court had no other or better means of ascertaining the assessed value of the taxable property of the county than the relator or any other person had. It did not fix the valuation on the property. It had no control over the officer who did fix the valuation. He acted entirely independently of the county court. His office was created by statute, and its duties performed under and by authority of statute. When he completed the assessment of the taxable property of the county, he was required to make a written return in the shape of what is called the "Tax Book," and file it in the office of the clerk of the county court, as a record therein, to which every person has access if he desires.

Sec. 24, p. 1163, Wag. Statutes, § 61, *ibid*; § 65, *ibid.*

VII.

There is no authority for stating that the county court of Macon county ever "levied a tax of *one half* of one per cent. to pay the interest, and therewith paid the interest and principal in full of some of its bonds." On the contrary, the return states: "That said county court, under, and by virtue of the provisions of said act,

levied a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property of, and in, said county, for each and every year, from the year 1867 to the year 1875, inclusive, for the purpose of paying said bonds and interest." (Page 10 of Transcript.) This includes every year from the time of making the first subscription until the date of making the return in 1875.

VIII.

The subscription in controversy was not made under the General Statutes, as has already been shown. If it had been, then it would have been void, because it "had not been voted for by a majority of the resident voters," as required by an act entitled, "An act supplemental to an act entitled, 'An act to authorize the formation of Railroad Associations and to regulate the same.'" approved December 13, 1855, approved March 23, 1861. (Session Acts 1860 and 1861, p. 60.) The second section of which is as follows:

"*It shall not be lawful for the county court of any county* to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters who shall vote at such election under the provisions of this act."

Carpenter vs. Lathrop, 51 Mo., p. 484.

State *ex rel.* Wilson vs. Garroutte, p. 29, Vol. 7, Central L. Journal.

Downing vs. Ringer, 7 Mo., 585.

State vs. Hannibal and St. Joseph R. R. Co., 60 *ibid*, 143.

IX.

The 13th section of the charter has application to the relator. His information for an alternative writ of mandamus states that his judgment was obtained on coupons detached from bonds issued under said section, and the return to the writ admits the same. Hence, the relator's whole case depends on the proper construction to be given to said section. Moreover, the defendant in error has a right to go behind the judgment and ascertain what rights are secured to him by the law under which the bonds were issued.

State vs. The Treasurer of Callaway county, 43 Mo., p. 228.

State vs. Walker, *supra*.

Von Hoffman vs. City of Quincy, 4 Wall., 549.

Hawthorn vs. Calef, 2 *id.*, 10.

X.

This court follows the decisions of the highest court of a State construing its own Constitution and Statutes.

Green vs. Neal, 6 Pet., 291.
United States vs. Morrison, 4 *id.*, 124.
Leffingwell vs. Warren, 2 Black, 599.

XI.

The relative rights of the holders of bonds issued respectively under the first and second subscriptions can be adjudicated in this proceeding. The security is *inadequate* to pay both sets of bonds. The first set of bonds was issued in obedience to a *mandamus* from the Supreme Court of the State. The assessed value of the taxable property of the county, for the year (1867) in which said bonds were issued, was $5,145,810. The tax on this amount of one-twentieth of one per cent. was not sufficient to pay the interest on the bonds issued that year. But the presumption was, that the building of the Missouri and Mississippi Railroad through the county would draw such an immigration into the county, and develop its resources so greatly, and the taxable property of the county would be so much enhanced in value, that a tax of one-twentieth of one per cent. would be ample to pay the bonds and accruing interest on the bonds issued in payment of the first subscription. The immigration did not come, the resources of the county were not developed, and the taxable property of the county was not enhanced in value. The result is, that the income derived from the tax of "one-twentieth of one per cent. upon the assessed value of the taxable property for each year" is inadequate to pay the interest on the first set of bonds. Why, then, should the second set of bondholders be allowed to come in and despoil, *pro tanto*, the first set of bondholders of their *inadequate* security? The second set of bondholders bought with their eyes open. The order of the county court which authorized the issue of the second set of bonds *recited* the issue of the first set of bonds. The second set of bonds recited the fact that they were issued pursuant to an order of the county court of Macon county, and under authority of the act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865. (*Vide* County of Macon vs. Shores, decided at October Term, 1877, not reported.) By a reference to this act the

relator would have seen that the county court was, and is *limited* to the levy of "a tax to pay the same, *not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.*" And if he had pursued his inquiry a little further, (as he was bound to do at his peril,) by stepping into the county clerk's office of Macon county, or into the office of the State Auditor at Jefferson City, he could have seen the exact amount of "the assessed value of the taxable property for each year;" and then he would have had all the data from which he could have ascertained whether there would have been anything left to pay him, after paying the interest on the first issue of bonds. Do not the second set of bondholders sustain the same relation to this security that a second mortgagee would to a security which is inadequate to pay the first mortgagee?

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

JAMES CARR and
W. P. HALL,
For Defendant in Error.

Jno Swayne

9 Wall 582
Oct. T. 1878

In the United States Supreme Court.

No. 98.

OCTOBER TERM, 1878.

UNITED STATES, *ex rel.* ALFRED HUIDEKOPER,
Plaintiff in Error.

vs.

MACON COUNTY COURT,
Defendant in Error.

Error to the Circuit Court of the United States, for the Western District of Missouri.

MOTION BY PLAINTIFF IN ERROR FOR REHEARING.

JOSEPH SHIPPEN,
Attorney for Plaintiff in Error.

SAINT LOUIS:
PIERCE BROS., PRINTERS, 211 NORTH THIRD STREET.
1879.

In the United States Supreme Court.

No. 98.

OCTOBER TERM, 1878.

UNITED STATES, *ex rel.* ALFRED HUIDEKOPER,
Plaintiff in Error.

vs.

MACON COUNTY COURT,
Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Missouri.

MOTION BY PLAINTIFF IN ERROR FOR REHEARING.

And now again comes Alfred Huidekoper, relator, plaintiff in error, and moves the court to grant a rehearing in this case, and to modify the decision herein made, as also the grounds on which it was based, stating for this motion the following grounds:

1. That the conclusion heretofore reached herein is based on a misconception of the applicability of the general statutes of Missouri in this case.

2. That said decision, so far as it relates to the said general statutes, is in direct conflict with the re-

peated and uniform decisions of the Supreme Court of Missouri relative thereto.

3. That said decision is not in conformity to the principles of law enunciated in prior and subsequent decisions upon the same subject by this court.

And plaintiff in error furthermore moves that this case and motion be continued to the next term with privilege to the parties to file briefs upon above motion.

JOSEPH SHIPPEN,
For Pl'ff in Error.

PLAINTIFF'S BRIEF.

I.

Ample power to provide, by taxation, for the payment of interest upon the bonds authorized, was conferred by the general statutes of the state of Missouri, in existence at the time this special charter was adopted February 20, 1865, when the bonds were issued May 2, 1872, and now still in force.

This controversy relates to the charter of the Missouri & Mississippi Railroad Company, approved February 20, 1865, viz:

Section 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.

Express decision was made thereon by this court in United States v. Clark County Court, 96 U. S., 211,

adhered to herein, that said charter provision authorized a special tax, distinct from and in addition to the taxes which, by other statutes, the county court was authorized to levy. Said statutes are as follows:

1. Revised Statutes of 1855, pp. 427, 429, 438.

"SECTION 30. It shall be lawful for the county court of any county and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this state; and the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city, as to such subscription and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

"SEC. 31. Upon the making of such subscription by any county court or city, as provided for in the previous section, such county or city shall thereupon become like other subscribers to such stock, entitled to the privilege, granted and subject to the liabilities imposed by this act, or by the charter of the company in which such subscription shall be made; and in order to raise funds to pay the installment which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court or city council making such subscription to issue their bonds *or levy a special tax upon all property and taxables made taxable by the law for state and county purposes, and upon the actual capital that all merchants and grocers may have invested in the county or city to pay such installments to be kept apart from other funds and appropriated to no other purposes than the payment of such subscription;* but the total amount of tax levied for railroad purposes in any one year, in any county or

city, shall not exceed thirty per centum of the subscription made by such county or city."

"SEC. 33. * * * * Any county or city subscribing as aforesaid, may (if so required by the railroad company to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax) issue the bonds of such city or county of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding seven per cent. per annum."

"SEC. 34. Any county court or city which has heretofore subscribed to the capital stock of any railroad in this state shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities by this act and may *levy a special tax to pay the interest on their bonds or to provide a sinking fund to pay the principal.*"

"SEC. 57. All existing railroad corporations within this state, and such as *now or may be hereafter chartered*, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilites and provisions, not inconsistent with the provisions of their charter contained in this act."

1 Wagner's Missouri Statutes, pp. 305, 306:

"SEC 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such county, city or town in, or loan the credit thereof to any railroad company duly organized under this or any other law of the state; *provided*, that two-thirds of the qualified

voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

"SEC. 18. Upon the making of such subscription by any county court, city or town as provided for in the previous section, such county, city or town shall thereupon become like other subscribers to such stock, entitled to the privileges granted and subject to all the liabilities imposed by this chapter or by the charter of the company in which such subscription shall be made, and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court or city council or trustees of such town making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town, to pay such installments, to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year in any county, city or town, shall not exceed thirty per centum of the subscription made by such county, city or town."

"SEC. 20. Any county subscribing for railroad stock, which shall have internal improvement funds or overflowed or swamp lands granted to it by the state, may apply such funds or mortgage or sell such overflowed or swamp lands to pay such subscription or any part thereof, and provide for the remainder, if any, by the tax as aforesaid; and any county, city or town subscribing as aforesaid may (if so required by the railroad company to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax), issue

the bonds of such city, county or town, of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding seven per cent per annum."

"SEC. 21 Any county court, city or town which has heretofore subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city or town council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities by this chapter, and may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal."

"SEC. 48. All existing railroad corporations within this state and such as may be hereafter chartered or formed, shall, respectively, have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained."

2 Wagner's Missouri Statutes, 1193, County Revenue:

"SEC. 165. The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, except what is herein excepted by this act, but the county tax shall in no case exceed one-half of one per cent. on all taxable property and on all licenses made taxable by law, the county tax shall not exceed the state revenue tax more than one hundred per centum for the same time, but the county court of St. Louis county is empowered to impose such additional taxes to pay fines and for other purposes as may be prescribed

by law. The state interest tax not to be construed to be state revenue tax."

Present constitution of Missouri of October 30, 1875:

SEC. 11 of Article 10.—Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation, but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the hundred dollars valuation. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein according to the last assessment for state and county purposes and the rate allowed to each city or town by the number of inhabitants, according to the last census, taken under the authority of the state or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, *except taxes to pay valid indebtedness now existing* or bonds which may be issued in renewal of such indebtedness.

Such being the statutes when the charter was adopted, when the bonds were issued, and at the present time, and such the present constitutional provision, the corporation created was endowed with all the powers and privileges and subject to the provisions of said acts. There is nothing therein which, either expressly or by implication, confines the power of taxation thereby granted to subscriptions authorized by said general statutes. Such is a new theory of law which strikes down the statutory power to tax, not only for bonds, but for millions of bonds issued under other charters granted prior to the constitution of 1865. These

powers have been invoked and used in Missouri for years without question, for the payment of bonds issued under the old charters and similar in all respects to those here in controversy, except the provision of one twentieth of one per cent held by this court to be a security additional to what the holders of these bonds would otherwise have.

II.

The foregoing proposition has been repeatedly and uniformly enunciated by the Supreme Court of Missouri

In State *ex rel.*, Aull v. Shortridge *et al.*, 56 Mo., 126, in passing on the rights of a holder of this class of bonds, it is said: "At the time this railroad charter was passed, the general law authorized county courts which had issued bonds to railroad companies to levy taxes without limitation, to pay the interest on their bonds, and to provide a sinking fund to pay the principal (1 Revised Laws 1865, p. 429, § 34). This provision was continued in the general statutes of 1865 and is still the law in this state. And no doubt this provision would have entered into and formed a part of these bonds and might have so entered into the obligations of the contract as to prevent a subsequent repeal by the legislature, if there had been no restriction contained in the special act authorizing the subscription."

Again, in State *ex rel.*, Watkins v. Walker *et al.* (unreported, see green pamphlet filed in this case, page 35), after quoting the provisions of the general statutes, it is said:

"Sections 17, 18, 19 and 21 of the general statutes 1865, pp. 338, 339 are in all respects like those contained in the revised code of 1855, except the power of the county court to subscribe is made dependent upon the assent to such subscription of two-thirds of the qualified

voters of the county, expressed at a regular or special election to be held therein. It thus appears that the fullest provisions have been made by the general assembly for the creation of a fund distinct from the general expenditure or common fund of a county, out of which to pay an indebtedness incurred by a county on account of a subscription to stock of a railroad company or bonds issued in payment thereof, which fund is to be kept separate from all other funds and to be applied to that identical purpose and none other. These various provisions of the law have been referred to for the sole purpose of establishing the proposition that for the payment of such obligations, resort could only be had to the special fund, and that it never was the intention of the legislature that the common fund raised by taxation to defray the expenses of the county could be made chargeable with their payment, but on the contrary, that such latter fund was devised, provided and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government, as has been hereinbefore indicated.

Further reference is made to the brief of defendant of error herein, not as authority in law, but as clearly and unequivocally recognizing and stating the proposition now contended for.

III.

The conclusion herein attained is not consistent with the prior and subsequent rulings of this court.

In United States v. The County of Clark, 96 U. S., 211, this court in passing on the 13th section of this charter, decided relative to the alleged limitation of one-twentieth of one per cent., saying: "That was a special tax, *distinct from and in addition* to the ordinary tax, which, by other statutes, the county court was authorized to levy."

"To provide a particular fund as additional security for the payment of a debt."

"An additional provision made for the payment of the new debt authorized."

"Probably the tax of one-twentieth of one per cent. was authorized with a view to give to them additional credit, to make them more salable."

"It is incredible that the legislature intended to deny to the purchasers of the bonds any right to look for payment beyond such meagre provision."

"We cannot think the legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who might be so unfortunate as to hold them."

"Nor can we think that the legislature intended to set a trap for purchasers, and lead them to suppose they were obtaining valuable securities, when, in fact, they would obtain what was next to nothing."

U. S. *ex rel.* Parsons v. New Orleans (unreported).

Respectfully submitted,

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